THE DIALOGVE in Engliſh, betweene *a Doctor of Diuinitie*, and a Student in the Lawes of England

Newly corrected and Imprinted, with new *Additions.*

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Cum Priuilegio.

The first Dialogue in English, betwixt a Doctor of Diuinitie, and *a Student in the Lawes of England, of the grounds of the said Lawes, and of* conscience, newly corrected and eftsoones Imprinted with new Additions.

¶ *The Introduction.*

A Doctor of Diuinitie that was of great acquaintance and familiaritie with a Student in the Lawes of England, sayd thus vnto him: I haue had great desire of long time to know wherupon the Law of England is grounded, but because the most part of the Law of England is written in the French Tongue, therefore I cannot through mine owne studie attaine to the knowledge thereof: for in that Tongue I am nothing expert. And because I haue found thee a faithfull friend to me, in all my businesse, therefore I am bold to come to thee before any other to know thy mind, what be the verie grounds of the law of England as thou thinkest.

St That would aske a great leasure, & it is also aboue my cunning to do it. Neuertheles, that thou shalt not thinke that I would wilfully refuse to fulfill thy desire, I shal with good wil doe

that in me is to satisfie thy mind: But I pray thee that thou wilt first shew me somewhat of other Lawes that pertaine most to this matter, & that Doctors treat of, how Lawes haue begun. And then I wil gladly shew thee as me thinketh what be the grounds of the Law of England. *Dost.* I will with good will doe as thou saiest: Wherefore thou shalt vnderstand, that Doctors treat of foure Lawes, the which (as me seemeth) pertaine most to this matter. The first is the Law Eternall. The second is the Law of Nature of reasonable creatures, the which as I haue heard say, is called by them that be learned in the Law of England, the Law of reason. The third is the law of God. The fourth is the law of Man. And therefore I will first treat of the Law Eternall.

¶ Of the Law Eternall.

Cap. 1.

LIke as there is in euery artificer a reason of such like things as are to be made by his craft: so likewise it behoueth that in euery gouernor there be reason and a foresight, in ꝯ gouerning of such things as shall be ordered & done by him, to them that he hath the gouernance of. And forasmuch as almightie God is the creator and maker of all creatures, to the which he is compared as a workman to his workes: and is also the gouernour of all deeds and mouings that bee found in any creature: Therfore as the reason of the wisedome of GOD (in asmuch as creatures be created by him) is the reason & foresight

sight of all crafts and workes that haue been or shall be, so the reason of the wisedome of God mouing al things by wisedome made to a good end, obtaineth the name & reason of a law, and that is called the Law eternall.

And this law eternall is called the first law, & it is well called the first, for it was before all other lawes, and all other lawes be deriued of it: whereupon, Saint Augustine saith in his 1. Booke of Free arbitrement, that in Temporall Lawes, nothing is righteous ne lawfull, but that the people haue deriued to them out of the law eternall. Wherfore euerie mã hath right & title to haue ỹ he hath righteously, of the right wise iudgement of the first reason, which is the law eternall. Sr. But how may this law eternall be knowne? for as the Apostle writeth in the 5. Chapter of his first Epistle to ỹ Corinthians, Quæ sunt Dei nemo scit, nisi spiritus Dei. That is to say, No mã knoweth what is in God, but the spirit of God: wherefore it seemeth that he openeth his mouth against heauen, that attẽpteth to know it. Doct. This law eternall no man may know as it is in it selfe, but onely blessed souls that see God face to face. But almightie God of his goodnesse sheweth of it as much to his creatures as is necessarie for thẽ, for els God shold bind his creatures to a thing impossible: which may in no wise bee thought in him. Therefore it is to be vnderstood, that 3. maner of wais almighty god maketh this law eternall knowne to his creatures reasonable. First, by the light of naturall reason. Secõdly, by heauenly reuelatiõ. Thirdly, by ỹ order of a

Prince or any other secundarie gouernor that hath power to bind his subiects to a law.

And when the law eternall or the wil of God is knowne to his creatures reasonable by the light of naturall vnderstanding, or by the light of naturall reason, that is called the law of reason: and when it is shewed by heauenly reuelation in such manner as hereafter shall appeare, then it is called the law of God. And when it is shewed vnto him by the order of a Prince, or of any other secundarie gouernour, that hath a power to set a law vpon his subiects, then it is called the law of man, though originally it be made of God. For lawes made by mã that hath receiued therto power of god, be made by God. Therfore the said three lawes that is to say, the law of reason, the law of God and the law of man, the which haue seuerall names after the manner as they be shewed to man, be called in God, one law eternall.

And this is the law of which it is written, Prouerbiorum octauo, where it is said, Per me reges regnant, & legum conditores, iusta discernunt. That is to say, by mé kings raigne, and makers of lawes discerne the troth: and this sufficeth for this time of the law eternall.

¶ Of the law of reason, the which by doctors is called the law of nature of reasonable creatures.

Cap. 2.

FIrst it is to bé vnderstood, that the Law of nature may be considered in two maners, that

that is to say, generally and specially: when it is considered generally, then it is referred to all creatures, aswell reasonable, as vnreasonable, for all vnreasonable creatures liue vnder a certaine rule to them giuen by nature necessarie for them to the conseruation of their being, but of this Law it is not our intent to treat at this time. The law of nature specially considered: which is also called the Law of reason, pertaineth onely to creatures reasonable, that is, man, which is created to the image of God.

And this Law ought to bee kept aswell among Iewes, and Gentiles, as among Christian men, and this Law is alway good and righteous, stirring & inclining a man to good, and abhorring euill. And as to the ordering of the deeds of man it is preferred before the law of God, and it is written in the heart of euery man teaching him what is to be done, and what is to be fled: and because it is written in the heart, therefore it may not be put away, ne it is neuer changeable by no diuersitie of place ne time: and therefore against this law, prescription, statute, nor custome, may not preuaile, and if any be brought in against it, they bee not prescriptions, Statutes, nor customs, but things void and against Iustice, and all other lawes: aswell the Lawes of God as to the acts of men, as other, be grounded thereupon.

Stu. Sith the Law of reason is written in the heart of euery man, as thou hast said before teaching him what is to be done, & what is to

be fled, and the which thou sayest may neuer be put out of the heart, what needeth it then to haue any other law brought in, to order the acts and deeds of the people?

Do. Though the law of Reason may not be chaunged nor wholy put away, Neuertheless before the Law written, it was greatly let and blinded by euill customes, and by many sins of the people, beside our originall sin. Insomuch ỹ it might hardly be discerned what was righteous, and what vnrighteous, & what was good, and what euil. Wherefore it is necessarie for ỹ good order of the people, to haue many things added to the law of reason, aswel by ỹ Church, as by secular Princes, according to the manners of the Countrie and of the people, where such additions should be exercised. And this law of reason differeth from the law of God in two maners. For the law of God is giuen by reuelation of God, and this law is giuen by a naturall light of vnderstanding. And also the law of God ordereth a man of it selfe by a nigh way to the felicitie that euer shall endure. And the law of reason ordereth a man to the felicity of this life.

St. But what be the things that the Law of reason teacheth to be done, and what to be fled, I pray thee shew me?

Doct. The law of reason teacheth that good is to be loued, and euill is to be fled. Also that thou shalt doe to another that thou wouldest another should doe to thee. And that we may doe nothing against trueth. And that a man must liue peacefully with other. That Iu-

stice

stice is to be done to euerie man, and also that wrong is not to be done to any man.

And that also a trespasser is worthie to be punished, and such other: of the which follow diuers other secundarie commaundements, the which be as necessarie conclusions, deriued of the first. As of that commandement that god is to be beloued, it followeth that a man shall loue his benefactour: for a benefactor in that he is a benefactour, includeth in him a reason of godnesse, for else he ought not to be called a benefactour, that is to say, a good doer, but an euill doer. And so in that he is a benefactour, he is to be beloued in all times, and in all places. And this law also suffereth many things to be done, as that it is lawfull to put away force with force. And that it is lawfull for euery mā to defend himselfe and his goods against an vnlawfull power. And this Law runneth with euerie mans law, and also with the law of God, as to the deeds of mā, and must be alwayes kept and obserued, and shall alway declare what ought to follow vpon the generall rules of the Law of man, and shall restraine them if they be any thing contrarie vnto it.

And here it is to be vnderstood, that, after some men, the Law whereby all things were in common, was neuer of the Law of Reason, but onely in the time of extreame necessitie. For they say, that the Law of reason may not bee chaunged, but they say, it is euident that the Law whereby all things should be in common, is chaunged, wherefore they con-

conclude, that was neuer the Law of Reason.

¶ Of the law of God.

Cap. 3.

The Law of God is a certaine law giuen by reuelation to a reasonable creature, shewing him the will of God, willing that creatures reasonable bee bound to doe a thing, or not to do it, for obtaining of the felicitie eternall. And it is said for the obtaining of the felicitie eternal, to exclude the lawes shewed by reuelation of God for the politicall rule of the people, the which be called Judicials. For a law is not properly called the law of God, because it was shewed by reuelation of God, but also because it directed a mã by the nærest way to the felicitie eternall, as bẽn the lawes of the old Testament, that beene called Moralles, and the lawes of the Euangelists, the which were shewed in much more excellẽt maner, than the law of the old Testamẽt was: for that was shewed by the mediation of an Angell: But the Law of the Euangelists was shewed by the mediation of our Lord Jesu Christ, God and man: and the Law of God is alway righteous and iust, for it is made and giuen after the will of God. And therefore all acts and deeds of man, bee called righteous and iust, when they bee done according to the Law of God, and be conformable to it. Also sometime a law made by man is called the

law

law of God: As when a law taketh his principall ground vpon the law of God, and is made for the declaration or conseruation of the faith, and to put away heresies, as diuers lawes Canons, and also diuers lawes made by the cõmon people sometime do. The which therefore are rather to bee called the Law of God, than the law of man. Yet neuertheleſſe, all the Lawes Canon be not the Lawes of God: for many of them bee made onely for the politicall rule and conseruation of the people. Whereupon Iohn Gerſon in the treatiſe of the Spirituall life of the Soule, the ſecond Leſſon, and the third Corolarie, ſaith thus: All the Canons of Biſhops nor their decrees be not the Law of God: For many of them bee made onely for the politicall conſeruation of the people. And if any man will ſay, Bee not all the goods of the Church ſpirituall, for they belong vnto the ſpiritualitie, and lead to the ſpirituall life? Wee anſwere: That in the whole politicall conſeruation of the people, there bee ſome ſpecially deputed and dedicated to the ſeruice of God, the which moſt ſpecially (as by an excellencie) are called ſpirituall men, as religious men are. And other, though they walke in the way of God, yet neuertheleſſe, becauſe their office is moſt ſpecially to be occupied about ſuch things as pertaine to the Commonweale, and to the good order of the people, they bee therefore called ſeculer men or lay men. Neuertheleſſe, the goods of the firſt may no more bee called Spirituall, than the goods of the other, for they be things mere tem-

tempozall, and keeping the bodie as they do in the other. And by like reason, Lawes made foz the politicall ozder of the Church, be called many times spiritnall, oz the Lawes of God, Neuertheles, it is but vnpzoperly. And other be called Ciuill, oz the Lawes of man. And in this point many be oft times deceiued, & also deceiue other, the which iudge the things to be spirituall, the which all men know bee things tempozall and carnall. These be the wozds of Iohn Gerson in the place alledged befoze. Furthermoze, beside the Law of reason, and the law of man, it was necessarie to haue the Law of God, foz foure reasons.

The first, because man is ozdeined to ỹ end of the eternal felicitie, the which exceedeth the pzopoztion and faculty of mans powzer. Therfoze it was necessarie that beside the Law of reason and the Law of man, he should be directed to his end by a Law of God.

Secondly, fozasmuch as foz the vncertainty of mans iudgement, specially of things peculier and seldome falling, it happened oft times to follow diuers iudgements of diuers men, & diuersities of lawes, and therefoze to the intent that a man without any doubt may know what he should do, and what he should not doe: It was necessarie that he should bee directed in all his deeds by a Law heauenly giuen by God, the which is so apparent, that no man may swerue from it, as is the Law of God.

Thirdly, man may only make a law of such things as he may iudge vpon, and the iudgement of man may not be of inward things, but onely

enely of outward things, and neuertheleſſe it belongeth to perfection that a man be well ordred in both, that is to ſay, alwell inward as outward. Therfore it was neceſſarie to haue the Law of GOD, the which ſhould order a man alwell of inward things, as of outward things.

The fourth is, becauſe as Saint Auguſtine ſaith in the firſt booke of frée Arbiterment, the law of man may not punish all offences: for if all offences ſhould be punished, the common wealth ſhould be hurt, as is of contracts. For it cannot be auoided, but that as long as contracts be ſuffered, many offences ſhall follow therby, & yet they be ſuffered for the common wealth. And therefore that no euill ſhould be vnpunished, it was neceſſary to haue the Law of God that ſhould leaue no euill vnpunished.

¶ Of the Law of Man.

Cap. 4.

The Law of man (the which ſometime is called the law poſitiue) is deriued by reaſon, as a thing which is neceſſarie & probably following of the Law of reaſon, & of the law of god. And that is called probable in that it appeareth to many, & ſpecially to wiſe men, to be true. And therfore in euery law poſitiue well made, is ſomewhat of the law of reaſon, and of the law of God. And to diſcerne the law of god & the law of reaſon frō the law poſitiue, is very hard. And though it be hard, yet it is much

much necessarie in euerie morall doctrine, and in all Lawes made for the cõmon wealth. And that the law of man be iust and righteous, two things be necessarie, that is to say: wisedome and authoritie. Wisedome, that hee may iudge after reason what is to bee done for the Comminalty, & what is expedient for a peaceable conuersation and necessarie sustentation of them. Authoritie, that hee haue authoritie to make Lawes, For the Law is derined of Ligare, that is to say, to bind. But the sentence of a wise man doth not bind the Comminaltie, if hee haue no rule ouer them. Also to euerie good Law bee required these properties, that is to say, that it be honest, righteous, possible in it selfe, and after the custome of the countrie, conuenient for the place and time, necessarie, profitable and also manifest, that it be not captious by any darke sentence, ne hurt with any priuat wealth, but all made for the common wealth. And after Saint Bridget in the 4. booke in the hundred twentie nine chapter, Euerie good law is ordeined to the health of the soule, and to the fulfilling of the lawes of God, and to induce the people to flie euill desires, and to do good workes. Also the Cardinall of Camerer writeth, whatsoeuer is righteous in the law of Man, is righteous in the law of God. For euerie mans Law must bee consonant to the Law of God. And therefore the Lawes of Princes, the commandements of prelates, the statutes of comminalties, ne yet the Ordinance of the Church is not righteous nor obligatory, but it be consonãt to the law of God.

And

And of such a Law of man that is consonant to the Law of God, it appeareth who hath right to Lands and goods, and who not: For whatsoever a man hath by such lawes of man, hee hath righteously. And whatsoever is hath against such lawes, is vnrighteously had.

For lawes of man not contrarie to the law of God, nor to the law of reason, must bee observed in the law of the soule: and hee that despiseth them, despiseth God, and resisteth God. And furthermore as Gratian saith, because euill men feare to offend for feare of pain: Therefore it was necessarie that diuers pains should be ordeined for diuers offences, as Phisitions ordeined diuers remedies for seueral diseases. And such paines be ordeined by the makers of Lawes, after the necessitie of the time, and after the disposition of the people. And though that law that ordeined such paines hath thereby a conformitie to the Law of God, (for the law of God commaundeth that the people shal take away euill from among themselues) yet they belong not so much to the Law of GOD, but that other paines (standing the first principles) might bee ordeined and appointed therefore, that is the law that is called most properly the Law Positiue, and the law of man.

And the Philosopher said in ỹ third booke of his Ethikes, that the intent of a maker of a law is to make the people good, and to bring them to vertue. And although I haue somewhat in a generall shewed thee whereupon the Law of Eng-

England is grounded (For of necessitie it must be grounded of the said lawes, that is to say, of the law Eternall, of the law of Reason, and of the law of God) Neuertheless, I pray the shew me more specially wherupon it is grounded as thou thinkest, as thou before hast promised to doe.

Stu. I will with good will doe therein that lyeth in me, for thou hast shewed me a right, plain and straight way thereto. Therfore thou shalt vnderstand, that the Law of England is grounded vpon sixe principall grounds. First it is grounded on the Law of Reason. Secondly, on the Law of God. Thirdly, on diuers generall Customes of the Realme. Fourthly, on diuers Principles that be called Maxims. Fiftly, on diuers particular Customes. Sixtly, on diuers Statutes made in Parliaments by the King, and by the Common Counsell of the Realme. Of which grounds I shall speake by order as they be rehearsed before. And first of the Law of Reason.

¶ Of the first ground of the Law of England.

Cap. 5.

THe first ground of the Law of England is the Law of Reason, whereof thou hast treated before in the 2. Chap. the which is kept in this Realme, as it is in all other Realms, & as of necessitie it must needs be (as thou hast said before.) D. But I would know what is called ℔ law of Nature after ℔ lawes of

England,

England. St. It is not vsed among them that be learned in the lawes of England to reason what thing is commanded or prohibited by the law of nature, & what not, but all the reasoning in that behalfe is vnder this maner. As whē any thing is grounded vpon the law of nature, they say, that reason will þ such a thing be done, & if it be prohibited by the law of nature, they say it is against reason, or that reason will not suffer that to be done. Doct. Then I pray thee shew me what they that be learned in þ lawes of the realme hold to be commaunded or prohibited by the law of nature, vnder such termes and after such maner as is vsed among them that be learned in the said lawes.

St. There be put by them that be learned in þ lawes of England two degrees of the Law of Reason, that is to say, the law of reason primary, & the law of reason secundary: by the law of reason primarie be prohibited in the lawes of England murther (that is þ death of him that is innocent) periurie, deceit, breaking of the peace, & many other like. And by the same law also, it is law vnlfor a man to defend himselfe against an vniust power, so he keep due circumstance. And also, if any promise be made by mā as to the bodie, it is by the law of reason void in the lawes of England. The other is called the law of Secundary reason, the which is diuided into two branches, that is to say, into the lawe of a Secundarie reason general, and into a law of secundarie reason particular. The law of a secundarie reason generall, is grounded and deriued of the generall law, or generall

custome of propertie, whereby goods moueable & vnmoueable be brought into a certaine propertie, so that euerie man may know his owne thing. And by this braunch be prohibited in the Lawes of England disseisins, trespasse in lands & goods, rescuse, theft, vnlawfull withholding of another mans goods, & such other. And by the same law it is a ground in the law of England, that satisfaction must be made for a trespasse, and that restitution must be made of such goods as one man hath that belong to another man, the debts must be paid, couenāts fulfilled, & such other. And because disseisins, trespasse in lands & goods, theft, & other, had not beene knowne, if the law of propertie had not bin obtained: Therefore all things that be deriued by reason out of the said law of propertie, be called the law of reason secundarie generall, for the law of Property is generally kept in all Countries.

The law of reason secundarie particuler, is the law that is deriued upon diuers Customes generall and particuler, & of diuers Maximes and Statutes ordained in this realme. And it is called the law of reason secundarie particuler, because the reason in that case is deriued of such a Law that is only holden for law in this realme, and in none other realme.

Doct. I pray thee shew me some speciall case of such a law of Reason secundarie particuler for example. Stu. There is a law in England, which is a Law of custome, that if a man take a Distresse lawfully, that he shall put it in pound ouert, there to remaine till he be satisfied

fied of that he distreined for. And then thereupon may be asked this question, that if the beasts dye in pound for lack of meat, at whose peril dye they, whether dye they at the peril of him that distrained, or of him that oweth the beasts? D. If the law be as thou sayest and that a man for a iust cause taketh a distresse, & putteth it in the pound Ouert, and no Law compelleth him that distreineth to giue them meat, then it seemeth of reason that if the distresse dye in pound for lacke of meat, that it died at the peril of him that oweth the beasts, and not of him that distreined, for in him that distreined there can be assigned no default, but in the other may be assigned a default, because the rent was vnpaid. Stu. Thou hast giuen a true iudgement, and who hath taught thee to doe so, but reason deriued of the said generall custome? And the law is so full of such secundarie reasons deriued out of the generall Customes and Maximes of the realm, that some mē haue affirmed that al the law of the realm, is the law of reason. But that cannot be proued as me seemeth, as I haue partly shewed before, and more fully will shew after. And it is not much vsed in the lawes of England, to reason what law is grounded vpon the Lawe of the first reason Primarie, or on the Lawe of reason secundarie for they be most commonly openly knowne of themselues, but for the knowledge of the Law of reason secundarie is greater difficultie, and therefore therein dependeth much the maner and forme of arguments in the Laws of England.

And it is to be noted that all the deriuing of Reason in the Law of England proceedeth of the first principles of the law, or of some thing that is deriued of them: and therefore no man may right wisely iudge ne groundly reason in the lawes of England, if he be ignorant in the first principles. Also all birds, fowles, wild beasts of forrests and warren & such other bee excepted by the Lawes of England out of the said general law and custome of propertie. For by the lawes of the realm no propertie may be of thē in any person, vnlesse they be tame. Neuertheless the egs of Hauke, Herons, or such other as build in the ground of any person, be adiudged by the said lawes to belong to him that oweth the ground.

¶ Of the second ground of the law of England.

Cap. 6.

The second groūd of the law of England is the law of God, & therefore for punishment of thē that offend against the Law of God, it is enquired in many courts in this realme, if any hold any opinion secretly or in any other manner against the true Catholike faith. And also if any general custome were directly against the law of God, or if any statute were made directly against it: as it were ordeined that no almes should bee giuen for no necessitie, the custom & statute were void. Neuertheless the statute made in the xxiij. yere of K. Ed. 3. whereby it is ordeined that no mā vnder paine of imprisonment shall giue any almes to any

any vaitãt beggers ẏ may wel labor, that they may so be compelled to labour for their liuing, is a good statute, for it obserueth the intent of the law of God. And also by authoritie of this law there is a ground in the laws of England that hee that is Accursed shall maintain no action in the kings court, except it be in very few cases, so that ẏ same excommunication be certified before the kings Justices in such maner as the law of the Realme hath appointed: and by the authoritie also of this ground, the law of England admitteth the spiritual iurisdictiõ of Dismes & offerings, and of all other things that of right belong vnto it, and receiueth also all lawes of the Church duly made, & that exceed not the powr of them that made thẽ. Insomuch that in many cases it behoueth ẏ kings Justices to iudge after ẏ lawes of the Church. Do. How may that be, that the kings Justices should iudge in the kings courts after the law of the church? for it seemeth that the Church should rather giue iudgemẽt in such things as it may make lawes of, thã the kings Justices. St. That may bee done in many cases, whereof I shal for an example put this case. If a writ of right of ward be brought of the bodie &c. And the tenãt confessing the tenure, & the nonage of the infant, saith, that the infant was maried in his auncestors dates &c. whereupon xij men be sworn, which giue this verdict, that the infant was maried in the life of his auncestors, and that the woman in the life of his auncestour sued a diuorce, whereupon sentence was giuen that they should bee diuorced, and that the

heire appealed, which hãgeth yet vndiscussed, praying the aid of the Justice to know whether the infant in this case shall be said maried or no. In this case if the law of the Church be that the said sentence of Diuorce standeth in his strength & vertue vntil it be adnulled vpõ the said appeale: That the infant at the death of his ancestor, was vnmarried, because ꝑ first, mariage was adnulled by that diuorce: and if the law of the church be that the sentẽce of the diuorce standeth not in effect till it be affirmed vpon the the sayd appeal, then is the infant yet maried, so that the value of his marriage cannot belong vnto the Lord, and therefore in this case iudgement conditional shal be giuen &c. & in likewise the kings Justices in many other cases shall iudge after the law of the Church, like as the spirituall iudges must in many cases, form their iudgemẽt after the kings lawes. D. How may that be, that the spirituall Iudges should iudge after the kings lawes? I pray thee shew me some certaine case thereof. Stu. Though it be somewhat a digression from our first purpose, yet I will not withsay thy desire, but will with good will put thee a case or two therof, that thou maist the better perceiue what I meane. If A. & B. haue goods iointly, and A. by his last will bequeath his portion therein to C. & maketh the said B. his Executor & dieth, and C. asketh the execution of this will in the spirituall court: In this case ỹ Iudges there be bound to iudge that will be void, because it is void by the lawes of this realme. And likewise if a man be outlawed, and after

by

by his wil bequeath certaine goods to John at Stile, & make his executors and die, the king seiseth the goods & after giueth them againe to the executors, & after J. at Stile sueth a citation out of ỹ spirituall court against the executors, to haue execution of the wil: In this cas the Iudges of ỹ spirituall court must iudge ỹ wil to be void, as the law of the realme is that it is, and yet there is no such law of forfeiture of goods by outlawrie in the spirituall law.

¶ Of the third ground of the Law of England. Cap. 7.

The third ground of the law of England, standeth vpon diuers Generall customes of old time vsed through all the Realme, which haue bin accepted & approued by our soueraigne lord the king & his progenitors, & all his subiects: & because the said customs be neither against the Law of God, nor the Law of reason, and haue bin alway taken to be good and necessarie for the commonwealth of all the Realme: Therefore they haue obtained the strength of the law, insomuch that he that doth against them, doth against Iustice: and these be the customes ỹ properly be called the Common Law: and it shall alway be determined by the Iustices whether there be any such generall custome or not, and not by 12. men: and of these general customes, and of certaine principles ỹ be called Maximes, which also take effect by the old custome of the Realme (as shall appeare in the Chapter next following) dependeth most part of the law of this Realme.

And therefore our soueraign Lord the king at his Coronation among other things taketh a solemne oath, that he shal cause all the customes of his realme fai thfully to be obserued. Do. I pray thee shew me some of these generall customes. Sr I will with good will, & first I shall shew thee how the custome of the Realme is the verie ground of diuers Courts in the Realme, that is to say, of the Chauncery, of the K. bench, of the common pleas, and the Exchequer, the which be courts of record, because none may sit as Iudges in these courts but by the kings letters patents. And these courts haue diuers authorities, whereof it is not to treat at this time. Other courts there be also only grounded by the custome of ỹ realme, that be of much lesse authoritie than the courts before rehearsed. As in euerie shire within the realme, there is a court that is called the county & another that is called the sheriffs Torne, & in euery manor is a court that is called a court Baron, and to euery faire & market is incidēt a Court that is called a court of Pipowders. And though in some statutes is made mention sometime of the said Courts, yet neuertheless of the first institution of the said courts, & that such Courts should be, there is no statute nor law written in the lawes of England. And so all the ground and beginning of the said courts depend vpon the custome of the realm, the which custome is of so high authoritie, that the said courts ne their authorities may not be altered ne their names changed without Parliament.

Also

Also by the old custome of the Realme, no man shall be taken, imprisoned, disseised, nor otherwise destroyed, but he be put to answer by the law of the land, and this custome is confirmed by the statute of Magna charta cap. 26.

Also by the old custome of the Realme, all men great and small shall do & receive Justice in the kings Courts, and this custome is confirmed by the statute of Marleb. cap. 1.

Also by the old custome of the Realme, the eldest sonne is onely heire to his Ancestor, and if there bee no sonnes but daughters, then all the daughters shall bee heires. And so it is of sisters and other kinswomen. And if there bee neither sonne, daughter, brother, nor sister, thē shall the inheritance discend to ꝑ next kinsman or kinswoman of the whole blood to him that had the inheritance, of how many degrees soeuer they be from him. And if there be no heire generall nor speciall, then the land shall escheat to the Lord of whom the land is holden.

Also by the old custome of the realme, lands shall neuer ascend, or discend, from the sonne to the father or mother, nor to any other ancestor in the right line, but it shall rather escheat to the Lord of the fee.

Also if any Alien haue a sonne that is an Alien, and after is made Denizen, and hath another sonne, and after purchaseth lands & dyeth, the youngest sonne shall inherit as heire, and not the eldest.

Also if there be three brethren, & the middest brother purchase lands and dyeth without heire of his bodie, the eldest brother shal inherit as

as heire to him, and not the ponger brother.

And if land in fee simple discend to a mã by the part of his father, & he dieth without heire of his body, then the inheritance shal discend to the next heire of the part of his father. And if there be no such heire of the part of his father, then if the father purchaseth the lands, it shall go to the next heire of the fathers mother, & not to the next heire of the sonnes mother, but it shall rather escheat to the Lord of the fee. But if a mã purchase lands to him & to his heires, & die without heir of his bodie, as is said before, thẽ the land shal discend to the next heire of the part of his father, if there be any, & if not, then to the next heire of the part of his mother.

Also the sonne purchaseth lands in fee, and dieth without heire of his bodie, the Land shal discend to his vncle, and shall not ascend to his father: But if the father haue a sonne though it be many yeares after the death of the elder brother, yet that sonne shall put out his vncle, and shall inioy the Land as heire to the elder brother for euer.

Also by the custome of the realme, the child that is borne before espousels is Wallard, and shall not inherit.

Also the custome of the realm is, that no maner of goods nor cattels reall nor personal shal neuer go to the heire, but to the executors, or to the Ordinarie, or administrators.

Also the husband shall haue all the chattels personals that his wife had at the time of the espousels, or after, and also chattels reall if he ouerliue his wife: But if he sell or giue away the

the chattels reals & die, by that sale or gift the interest of the wife is determined, or else they shal remain to the wife, if she ouerliue her husband. Also the husband shal haue al the inheritance of his wife wherof he was seised in deed in the right of his wife during the espousels in fee, or in fee taile general, for terme of life, if he haue any child by her, to hold as tenant by the curtesie of England, & the wife shall haue the third part of the inheritance of her husband wherof he was seised in deed or in law after ꝑ espousels &c. But in that case the wife at the death of her husbād must be of the age of nine yere or aboue, or els she shal haue no dowre. D. What if the husbād at his death be within the age of nine yeres? I suppose she shal yet haue her dower. Also the old law & Custome of the Realme is, that after the death of euery tenant that holdeth his Land by knights seruice, the Lord shal haue the ward and mariage of the heir, til the heir come to the age of 21. yeares, & if the heir in that case be of ful age at the death of his ancestor, thē he shal pay to his Lord his relefe, which at the cōmon law was not certain, but by the stat. of Magn. it is put in certain: that is to say, for euery whole knights fee to pay C.S. and for a whole Barony to pay a C. marks for relefe, & for a whole Erledom to pay a C.l. and after the rate. And if the heire of such a tenant be a woman, & she at the death of her ancestor be within the age of xiiij yeres, then by the common law she should haue bin in ward onely til 14. yeres, but by the stat. of R.II. 1. in such case she shal be in ward till 16. yeres.

And

And if at the death of her aunceſtor ſhee bee of the age of 14. yeare or aboue, ſhe ſhall bee out of ward though the land be holden of the king, & then ſhe ſhal pay reliefe as an heire male ſhal.

Alſo of lands holden in Socage, if the aunceſtor die, his heire being within the age of 14. yeres, the next friend of the heire to whom the inheritance may not diſcēd ſhal haue the ward of his bodie and lands, till he ſhall come to the age of 14. yeares, and then hee may enter. And when the heire cōmeth to the age of xxj. yeres, then the gardein ſhall yeeld him an account for the profits thereof by him receiued.

Alſo ſuch an heire in ſocage for his reliefe ſhall double his rent to the Lord the yeare following the death of his aunceſtor: As if his aunceſtor held by xij. ō. rent, the heire in the yere following ſhall pay the xij ō. for his rent, and other xij. ō. for his reliefe, and the reliefe he muſt pay though he be within age at the death of his aunceſtor.

Alſo there is an old Law and Cuſtome in this Realme, that a freehold by way of feoffement, gift, or leaſe, paſſeth not without Liuerie of ſeiſin be made vpō the lād according, though a deed of feoffement be thereof made and deliuered: But by way of ſurrender, partition, and exchange, a freehold may paſſe without liuerie.

Alſo if a man make a will of land whereof he is ſeiſed in his demeſne as of fee, that will is void: but if it had ſtood in feoffees hand, it had bin good. And alſo in London ſuch a will is good by the cuſtome of the city if it be inrolled.

Alſo a leaſe for term of yeres is but a chattell by

by the law, and therefore it may passe without any liuery of seisin: but otherwise it is of a state for term of life for that it is a freehold in the law, and therefore liuerie must be made or els the freehold passeth not.

Also by the old Custome of the realme, a mā may distraine for a rent seruice of cōmon right. And also for a rent reserued vpō a gift in taile, a lease for terme of life, of peres, & at will, & in such case the Lord may distreine the beasts of tenants, as sone as they come vpō the groūd, but the beasts of strangers that come in but by maner of an escape, he may not distrein til they haue bin leuant & couchant vpon the ground: but for deb. vpō an obligation, nor vpō a contract, nor for accompt, ne yet for arrerages of accompt, nor for no maner of trespasse, separations, nor such other, no man may distraine.

And by the old Custome of the realme all issues that shall be ioyned betweene partie and party in any court of record within the realme, except a few whereof it needeth not to treat at this time, must be tried by xij. free & lawful mē of the visne that be not of affinitie to none of the parties. And in other courts that be not of record, as in the county, court baron, hundred & such other like, they shal be tried by the Oth of the parties, & not otherwise, vnlesse the parties assent that it shalbe tried by the homage. And it is to be noted that Lords, barons, & al peers of the realme be excepted out of such trials if they will, but if they will wilfully be sworne therein, some say it is no error. And they may if they will haue a writ out of the Chancery directed

rected to the Shirife commanding him that he shall not impannell them vpon no enquest.

And of this that is sayd before it appeareth that the customes aforesayd nor other like vnto them, whereof be verie many in the lawes of Englãd, cannot be proued to haue the strẽgth of a law onely by reason. For how may it bee proued by reason that the eldest son shall onely inherite his father, and the yonger to haue no part, or that the husband shall haue the whole land for terme of his life as tenant by the curtesie, in such manner as before appeareth, and that the wife shall haue onely the third part in the name of the dower, & that the husband shal haue al the goods of his wife as his owne, and that if he die liuing the wife, that his executors shall haue the goods, and not the wife: all these and such other cannot be proued onely by reason that it should be so and no otherwise, although they be reasonable, and that with the custome therein vsed sufficeth in the Law, and a statute made against such generall customes ought to be obserued, because they be not meerly the law of reason.

Also the law of propertie is not the law of reason, but a law of custome, howbeit that it is kept, & is also most necessarie to be kept in all realmes & among all people, and so it may be numbred among the generall customes of the realme, & it is to vnderstand that there is no statute ẏ treateth of the beginning of the said customs, ne why they should be holden for law, and therefore after them that be learned in the laws of the realm, the old custome of the realm

is the onely and sufficient authoritie to them in that behalfe: and I pray thee shew me what Doctors hold therein, that is to say, whether a custome onely bee a sufficient authoritie of any Law. Do. Doctors hold that a lawe grounded vpon a custome is the most surest Lawe, but this thou must alwayes vnderstand therewith that such a custome is neither contrarie to the law of reason, nor to the law of God. And now I pray thee shew me somewhat of the Maximes of the law of England, whereof thou hast made mention before in the 4. Chapter. Stu. I will with good will.

¶ Of the 4. ground of the law of England: Cap. 8.

The 4. groũd of the law of England standeth in diuers principles that be called in the law Maximes, the which haue bin alwayes taken for law in this realm, so that it is not lawfull for any that is learned to deny thẽ: for euerie one of those Maximes is sufficient authoritie to himselfe. And which is a Maxime, and which not, shall alway be determined by the Iudges, and not by xij. men. And it needeth not to assigne any reason, why they were first received for Maximes, for it sufficeth that they be not against the Law of reason, nor the law of God, & that they haue alway bin taken for a law. And such Maximes be not only holden for law, but also other cases like vnto thẽ, and al things that necessarily follow vpon the same, are to be reduced to ẏ like law, & therfore most commõly there be assigned some reasõs or con-

consideration why such Maximes be reasonable, to the intent that other cases like, may the more conuenently be applied to thē. And they be of the same strength and effect in the law as statutes be. And though the generall customs of the Realme, be the strength & warrant of the said Maximes as they be of the generall customes of the realme, yet because the said general customes be in maner knowne through the Realme, aswell to them that be vnlearned as learned, and may lightly be had & knowne, and that with little studie; and the Maximes be only knowne in the Kings Courts, or among them that take great studie in the Law of the Realme, and among few other persons: Therfore they bee set in this writing for seuerall grounds, and he that listeth may so accompt them, or if he will, he may take them for no ground, after his pleasure. Of which Maximes I shall hereafter shew thée part.

First there is a Maxime, that Escuage vncertaine maketh Knights seruice.

Also there is another Maxime, that Escuage certaine maketh socage.

Also that he that holdeth by Castel gard, holdeth by knights seruice, but he holdeth not by Escuage. And that he that holdeth by xx. s. to the gard of a castell, holdeth by socage.

Also there is a Maxime, that a Discent taketh away an entrie.

Also, that no Prescription in Lands maketh a right.

Also, that a Prescription of rent and profits appzender out of land, maketh a right.

Al-

Also that the limitation of a prescription generally taken, is from the time that no mans minde runneth to the contrarie.

Also that assignes may be made vpon lands giuen in fee, for terme of life, or for terme of yeres though no mention be made of assignes: and the same law is of a rent that is granted, but otherwise it is of a warranty and of a couenant.

Also that a condition to auoid a freehold cannot bee pleaded without deed, but to auoid a gift of chattell it may bee pleaded without deed.

Also that a release or confirmation made by him that at the time of the release or confirmation made, had no right, is void in the Law, though a right come to him after, except it bee with warrantie, and then it shall bar him of al right that hee shall haue after the warrantie made.

Also that a right or title of action that onely dependeth in action, cannot be giuen nor granted to none other but onely to the tenant of the ground, or to him that hath the reuersion or remainder of the same.

Also that in an action of debt vpō a contract, the defendant may wage his Law, but otherwise it is vpon a leale of Lands for terme of yeres or at will.

Also if that any exigent in case of felonie bee awarded against a man: he hath thereby forthwith forfeited his goods to the king.

Also if the sonne bee attainted in the life of the father, and after hee purchaseth his charter

of pardon of the king, and after the father dyeth: In this case the land shall escheat to the Lord of the fee, in somuch that though hee haue a yonger brother, yet the land shall not discend to him: for by the attainder of the elder brother the bloud is corrupt, and the father, in law, died without heire.

Also if an Abbot or Prior alien the Lands of his house and dyeth, in this case, though his successor haue right to the lãds, yet he may not enter, but hee must take his action that is appointed him by law.

Also, there is a Maxime in the law, that if a villaine purchase lands and the Lord enter, he shall enioy the land as his owne: but if the villain alien before the Lord enter, the alienation is good. And the same law is of goods.

Also, if a man steale goods to the value of twelue pence or aboue, it is felonie, and he shal dye for it. And if it bee vnder the value of xij. pence, then it is but petite larcenie, and he shal not die for it, but shall bee otherwise punished after the discretion of the Iudges, except it bee taken from the Person: for if a man take any thing how little soeuer it bee, from a mans person feloniously, it is called robberie and hee shall die for it.

Also, he that is arraigned vpon an Inditement of felonie shall bee admitted in fauour of life to challenge xxxvj. Iurors peremptorily, but if hee challenge any aboue that number, the Law taketh him as one that hath refused the Law, because hee hath refused three whole Enquests, and therefore hee shall dye: but

with

with cause hee may challenge as many as hee hath cause of challenge to. And further it is to be vnderstood, that such peremptorie challenge shal not be admitted in appeale, because it is at the suit of the partie.

Also, the land of euery men is in the law enclosed from other, though it lie in the open field. And therefore if a man do trespas therein, the writ shal be Quare clausum fregit.

Also the rents, commons of pasture, of turbary, reuersions, remainders, nor such other things which lye not in manuall occupation, may not be giuen nor graunted to none other without writing.

Also that hee that recouereth debt or damages in the Kings Courts by such an action wherein a Capias lay in the Processe, may within a yeare after the recouerie, haue a Capias ad satisfaciendum to take the bodie of the defendant, and to commit him to prison till hee haue paid the debt and damages: but if there lay no Capias in the first action, then the plaintife shall haue no Capias ad satisfaciendum, but must take a Fieri facias, or an Elegit within the yeare, or a Scire facias after the yere, or within the yere if he will.

Also, if a release or confirmation be made to him, that at the time of the release made had nothing in the Land &c. the release or confirmation is void, except in certaine cases, as to vouch, and certaine other which need not here to be remembred.

Also there is a Maxime in the law of England, that the King may disseise no man, nor

that no man may diſſeiſe the king, ne pull any reuerſion or remainder out of him.

Alſo the kings excellencie is ſo high in the law, that no freehold may be giuen to the king, ne be demaunded from him, but by matter of Record.

Alſo there was ſometime a Maxime and a law of England, that no man ſhould haue a writ of right, but by ſpeciall ſuit to the king, & for a fine to be made in the Chaunceric for it. But theſe Maximes be changed by the ſtat. of Magna charta cap. 16. where it is ſaid thus. Nulli negabimus, nulli vendemus rectũ vel iuſtitiam And by the words Nulli negabimus, a man ſhall haue a writ of right of courſe in the Chaunceric without ſuing to the king for it. And by the words Nulli vẽdemus, he ſhal haue it without fine: ſo, many times the old Maximes of the law be chaunged by ſtatutes. Alſo though it bee reaſonable, that for the manifold diuerſities of actions that bee in the lawes of England, that there ſhould bee diuerſities of Proces, as in the real actions after one maner and in perſonall actions after another maner: Yet it cannot be proued merely by reaſon, that the ſame Proces ought to bee had and none other: for by Statute it might be altered. And ſo the ground of the ſaid Proces is to bee referred onely to the Maximes and Cuſtoms of the Realme.

And I haue ſhewed thee theſe Maximes before rehearſed, not to the intent to ſhew thee ſpecially what is the cauſe of the law in them, for that would aſke a great reſpite. But I

haue

haue shewed them only, to the intent that thou maist perceiue that the said Maxímes & other like, may bee conuenientlý set for one of the grounds of the Lawes of England. Moreouer there be diuers cases, whereof I am in doubt whether they be onely Maxímes of the law, or that they be grounded vpon the law of reason, wherein I pray thee let me heare thine opinion.

Do. I pray thée shew those cases that thou meanest, and I shall make thee answer therein as I shall see cause.

¶Hereafter follow diuers cases, wherein the Student doubteth whether they be only Maximes of the Lawe, or that they be grounded vpon the Law of Reason.

Cap. 9.

THe Law of England is, ỹ if a man command another to do a trespasse, & he doth it, that the commaunder is a trespasser.

And I am in doubt whether that it be onely by a Maxime of the law, or that it be by the Law of reason.

Also, I am in doubt vpon what Law it is grounded, that the accessorie shall not be put to answer before the principall &c.

Also, the law is, that if an Abbot buy a thing that commeth to the vse of the house, & dieth, that his successor shall be charged. And I am somewhat in doubt vpon what ground that

Law dependeth.

Also, that he ꝑ hath possessiō of land though it be by disseisin, hath right against all men, but against him that hath right.

Also, that if an action real be sued against any man that hath nothing in the thing demanded, the writ shall abate at the common Law.

Also, that the alienation of the tenant hanging the writ, nor his entrie into religiō, or if he be made a knight, or if she be a woman ⁊ take an husband hanging the writ, that the writ shall not abate.

Also, if Land ⁊ rent that is going out of the same land, come into one mans hand of like estate, and like suertie of title, the rent is extinct.

Also, if Land discend to him that hath right to the same Land before, he shalbe remitted to his better title if he will.

Also, if two titles be concurrant together, that the eldest title shall be preferred.

Also, that euerie man is bound to make recompence, for such hurt as his beasts shall doe in the corne or grasse of his neighbour, though he know not that they were there.

Also, if the demandant or plaintife hanging his writ, will enter into the thing demaunded, his writ shall abate. And it is many times verie hard ⁊ of great difficultie to know what cases of the law of England be grounded vpon the Law of reason, and what vpon custome of the Realme, and though it be hard to discusse it, it is very necessary to be knowne, for the knowledge of the perfect reason of the

Law:

law: & if any man think that these cases before rehearsed be grounded vpon the law of reason, then he may refer them to the first ground of the law of England, which is the law of reason, whereof is made mention in the 5. chapter. And if any man thinke that they be grounded vpon the law of custom, then he may refer thē to the Maximes of the law, which be assigned for the fourth ground of the Law of England, whereof mention is made in the 8. Cha. as before appeareth.

Do. But I pray thee shew me by what authoritie it is proued in the lawes of England, that the cases which thou hast put before in the viij. Chap. and such other which thou callest Maxims ought not to be denied, but ought to be taken as Maxims. For sith they cannot be proued by reason as thou agreest thy selfe they cannot, they may as lightly be denied as affirmed, vnles there be some sufficient authoritie to approue them.

Stu. Many of the customes and Maximes of the Lawes of England be knowne by the vse and the custome of the realme so apparantly that it needeth not to haue any Law written thereof. For what needeth it to haue any Law written that the eldest son shall inherite his father: or that all the daughters shall inherite together as one heire, if there bee no son: or that the husband shall haue the goods and chattels of his wife that shee hath at the time of the espousels, or after: or that a bastard shall not inherite as heire: or the executors shall haue the disposition of all the goods of

their testator: and if there be no executors that the Ordinary shall have it, & the heire shall not meddle with the goods of his Ancestor, but if any particular customes helpe him.

The other Maximes & customs of the law that be not so openly knowen amõg the people, may be knowne partly by the Law of Reason and partly by the bookes of the lawes of England called Yeares and Termes, and partly by diuers Records remaining in the K. Courts and in the Treasorie: and specially by a booke called the Register, & also by diuers Statutes, wherein many of the said Customes & Maximes be oft recited, as to a diligent Searcher, will euidently appeare.

¶ Of the fift ground of the Law of England.

Cap. 10.

The fift ground of the Law of England standeth in diuers particuler customs vsed in diuers counties, towns, cities, and Lordships in this realme, ℔ which particuler customes, because they be not against the law of reason nor the law of God, though they bee against the sayd generall Customes or Maximes of the Law, yet neuertheless they stand in effect and be taken for law: but if it rise in question in the kings courts, whether there be any such particuler custome or not, it shall be tried by xij. men, and not by the iudges, except the same particuler custome be of Record in

the

the same Court. Of which particuler Customes, I haue hereafter noted some for an example.

First there is a custome in Kent that is called Gauelkind, that all the brethren shall inherit together, as sisters at the common Law.

Also there is an other particuler Custome, that is called Burghenglish, where the yonger sonne shall inherite before the eldest, and that custome is in Notingham.

Also there is a custome in the Citie of London, that freemen there, may by their testamēt enrolled, bequeath their lands that they be seised of to whom they will, except to Mortmaine. And if they be Citizens and Freemen, that they may also bequeath their Lands to Mortmaine.

Also in Gauelkind, though the Father be hanged, the sonne shall inherite. For their custome is, the Father to the bough, the Son to the plough.

Also in some Countries the wife shall haue the halfe of the husbands lands in the name of her dowrie, as long as she liueth sole.

And in some country the husband shall haue the halfe of the inheritance of his wife, though he haue no issue by her.

Also in some Countrey an Infant when he is of age of xv. yeres may make a feoffement, and the feoffement good. And in some Countrey when he can meat an elle of Cloth.

¶ Of the sixt ground of the Law of England.

Cap.

Cap. 11.

THe firſt ground of the Law of England ſtandeth in diuers ſtatutes made by our Soueraigne Lord the king & his progenitors, & by the Lords ſpirituall & temporall, and the Commons in diuers Parliaments, in ſuch caſes where the law of reaſon, the law of God, Cuſtomes, Maximes, ne other grounds of the law ſeemed not to be ſufficient to puniſh euill men, and to reward good men. And I remember not, that I haue ſeene any other grounds of the Law of England, but onely theſe that I haue before remembred. Furthermore it appeareth of that I haue ſaid before, that oft times two or three grounds of the law of Englād muſt be ioyned together, or that the plaintif can open & declare his right, as it may appeare by this example. If a man enter into another mans land by force, and after maketh feoffement for maintnāce to defraud the plaintife from his action: In this caſe it appeareth that the ſaid vnlawfull entrie is prohibited by the Law of reaſon, but the plaintife ſhall recouer treble damages, that is by reaſon of the ſtatute made in the 8. yere of king H. 6. cap 9. And that the damages ſhalbe ceſſed by reaſō that is by the cuſtome of the realme. And ſo in this caſe, three grounds of the law of Englād maintaine the plaintifes action.

And ſo it is in diuers other caſes that need not to be remembred now. And thus I make an end for this time, to ſpeak any further of the grounds of the law of England. D. I thanke thee

thee for the great paine that thou haſt taken therein. Neuertheles, forasmuch as it appeareth that thou haſt ſaid before, that the learned men of the Law of England pretend to verifie, that the Law of England will nothing do, ne attempt againſt the law of Reaſon, nor the Law of God, I pray thee anſwer mee to ſome queſtions grounded vpon the Law of England, how as thou thinkeſt, the Law may ſtand with reaſon or conſcience in them.

St. Put the caſe, and I ſhall make anſwer therein as well as I can.

¶ The firſt queſtion of the Doctor, of the Law of England and conſcience.

Cap. 12.

I Haue heard ſay, that if a man that is bound in an Obligation pay the money, but he taketh no acquitance, or if hee take one and it happeneth him to leeſe it, that in that caſe hee ſhall be compelled by the Lawes of England to pay the money againe. And how may it be ſayd then, that that Law ſtandeth with reaſon and conſcience: for as it is grounded vpon the Law of Reaſon, that debts ought of right to be payed, ſo it is grounded vpon the Law of Reaſon (as mee ſeemeth) that when they be payed, that he that paied them ſhould be diſcharged. Stu. Firſt thou muſt vnderſtand, that it is not the Law of England, that if a man that is bound in an Obligation pay the money without Acquitance, or if he

hee take acquitance and leese it, that therefore the law determineth that he ought of right to pay ẽ money eftsones, for that law were both against reason and conscience. But though it is, that there is a general Maxime in the law of England, that in an action of debt sued vpõ an Obligation, the defendant shall not plead that he owneth not the mony, ne can in no wise discharge himselfe in that action, but he haue acquitance or some other writing sufficient in the Law, or some other thing like, witnessing that he hath paid the money: that is ordained by the Law to auoyd a great inconuenience that els might happen to come to many people: that is to say, that euerie man by a Nude parol, and by a bare Auerrement should auoyd an Obligation. Wherefore to auoyd that inconuenience, the Law hath ordayned, that as the defendant is charged by a sufficient writing, that so he must be discharged by sufficient writting, or by some other thing of as high authoritie as the Obligation is. And though it may follow thereupon, that in some particuler case a man by occasion of that generall Maxime may be compelled to pay the money againe that he paid before: Yet neuertheleſſe, no default can be thereof assigned in the Law. For like as makers of Law take hæd to such things as may oft fall, & do much hurt among the people, rather than to particular cases: So in likewise the generall grounds of the law of England, hæd more what is good for many, than what is good for one singuler person onely. And because it should be a hurt to many,

if

if an Obligation should bee so lightly avoided by word, therefore the Law specially preventeth that hurt under such maner as before appeareth: and yet intendeth not, nor commandeth not, that the money of right ought to bee paid againe, but letteth a generall rule which is good and necessarie to all the people, & that every man may well keep without it be through his owne default. And if such default happen in any person, whereby he is without remedie at the common law, yet her may bee holpen by a Subpena, and so hee may in many other cases where conscience serueth for him, that were too long to rehearse now.

Do. But I pray thee shew me vnder what maner a man may be holpen by cõscience. And whether he shall be holpen in the same court, or in another. St. Because it cannot bee well declared where a man shall bee holpen by conscience, & where not, but it be first knowne what conscience is, therefore because it pertaineth to thee most properly, to treat of the nature and qualitie of conscience, therfore I pray thee that thou wilt make me some briefe declaration of the nature and qualitie of conscience, & then I shall answere to thy question as well as I can. Do. I will with good will doe as thou saiest, & to the intent that thou maiest ỹ better vnderstand that I shall say of conscience, I shal first shew thee what Sindieresis is, & then what reason is, and then what conscience is; and how these three differ among themselues, I shall somewhat touch.

¶ What

¶ What Sinderesis is.

Cap. 13.

SInderesis is a naturall power of ẏ soule, set in the highest part thereof, mouing & stirring it to good, & abhorring euil. And therefore Sinderesis neuer sinneth nor erreth. And this Sinderesis our Lord put in man to the intent that the order of things should bee obserued. For after Saint Dionise, the wisedome of God ioineth the beginning of the secōd things to the last of the first things: for Aungell is of a nature to vnderstand without searching of reason, and to that nature mā is ioined to Sinderesis, the which Sinderesis may not wholy be extincted neither in man, ne yet in damned soules. But neuerthelesse, as to the vse and exercise thereof, it may bee let for a time, either through the darkenesse of ignorance, or for vndiscreet delectation, or for the hardnesse of obstinacie. First by the darkenesse of ignorance Sinderesis may be let, that it shall not murmure against euill, because hee beleeueth euill to bee good, as it is in heretikes, the which, whē they dye for the wickednesse of their errour, beleeue that they dye for the verie trueth of the faith. And by vndiscreet delectation, Sinderesis is sometime so ouerlaid, that remorse or grudge of conscience for that time can haue no place. For the hardnes of obstinacy Sinderesis is also let that it may not stirre to goodnesse, as it is in damned soules that bee so obstinate in euill,

that

that they may neuer be inclined to good. And though Sindereſis may be ſaid to that point extinct in damned ſoules, yet it may not bee ſaid that it is fully extinct to all intents. For they alway murmure againſt the euill of the paine that they ſuffer for ſinne, and ſo it may not bee ſaid that it is vniuerſally, and to all intents, and to all times extinct. And this Sindereſis is the beginning of all things that may bee learned by ſpeculation or ſtudie, and miniſtreth the generall grounds and principles thereof: and alſo of all things that are to bee done by man. An example of ſuch things as may bee learned by ſpeculation appeareth thus: Sindereſis ſaith that euerie whole thing is more than any one part of the ſame thing, & that is a ſure ground that neuer faileth. And an example of things that are to be done, or not to be done: as where Sindereſis ſaith no euill is to bee done, but that gwdneſſe is to bee done and followed, and euill to be fled, and ſuch other.

And therefore Sindereſis is called by ſome men, the Law of reaſon, for it miniſtreth the principles of the law of reaſon, the which be in euerie man by nature, in that he is a reaſonable creature.

¶ Of Reaſon.

Cap. 14.

When the firſt man Adam was created, hee receiued of God a double eye, that is to

to say, an outward eye, whereby hee might see visible things, and knowe his bodily enemies and eschew them. And an inward eye, that is the eye of reason, whereby hee might see his spirituall enemies that fight against his soule and beware of them. And among all gifts that God gaue to man, this gift of reason is the most noblest, for thereby man preceiueth all beasts, and is made like to the dignitie of Angels, discerning troth from falshood, and euill from good. Wherefore hee goeth far from the effect that he was made to, when he taketh not hed to the trueth, or when hee preferreth euil before good.

And therefore after Doctors, reason is the power of the soule, that discerneth betweene good and euill, and betweene good and better, comparing the other: the which also sheweth vertues, loueth good, and flyeth vices. And reason is called righteous and good, for it is conformable to the will of GOD, and that the first thing, and the first rule that all things must be ruled by. And reason that is not righteous nor straight, but that is said culpable, is either because she is deceiued with an Errour that might bee ouercome, or else through her pride or slothfulnesse shee enquireth not for knowledge of the trueth that ought to bee enquired. Also reason is diuided into two parts, that is to say, into the higher part and into the lower part.

The higher part hideth heauenly things & eternal, and reasoneth by heauenly Lawes or by heauenly reason what is to be done, & what

is

is not to be done, and what things God commaundeth, and what hee prohibiteth. And this higher part of reason hath no regard to transitory things or tempozall things, but that sometime as it were by maner of counsell, she bringeth forth heauenly reasons to order well tempozall things. The lower part of reason worketh most to gouerne wel tempozal things, and she groundeth her reasons much vpon lawes of man, & vpon reason of man, wherby she concludeth that that is to be done, that is honest and expedient to the commonwealth, or not to be done, that is not expedient to the Commonwealth. And so that reason whereby I know God and such things as pertaine to God, belongeth to the higher part of reason. And the reason whereby I know creatures, belongeth to the lower part of reason. And though these two parts, that is to say, the higher part & the lower part be one in dede & essence, yet they differ by reason of their working, and of their office, as it is of one selfe eye, that sometime looketh vpward, and sometime downeward.

¶ Of Conscience.

Cap. 15.

This word Conscience, which in latine is called cõscientia, is compounded of this prepositiõ cũ, ꝑ is to say in English, with, & of this nowne scientia, ꝑ is to say in English, knowledge, and so conscience is asmuch to say, as knowledge of one thing with another thing, & conscience so taken, is nothing els but

an applying of any scīēce or knowledg to some particuler act of man. And so conscience may sometime erre, & sometime not erre. And of cō-science thus takē, doctors make many descrip-tions, whereof one doctor saith, that conscience is the law of our vnderstāding. Another, that conscience is an habit of the mind discerning betwixt good & euill. Another, that cōscience is the iudgement of reason, iudging on the parti-culer acts of mā: all which sayings agrē in one effect (that is to say) that consciēce is an actual applying of any cunning or knowledge to such things as be to be done, whereupon it follow-eth, that vpō the most perfit knowledge of any law or cunning, & of the most perfit & most true applying of the same to any particuler act of man followeth ȳ most perfit, ȳ most pure, & the most best conscience. And if there be default in knowing of the truth of such a law, or in the applying of ȳ same to particuler acts, thē there-vpō followeth an error or default in cōscience, as it may appear by this exāple. Sindereſis mi-nistreth a vniuersall principle ȳ neuer erreth, (that is to say) ȳ an vnlawfull thing is not to be done. And thē it might be taken by some mā that euery oath is vnlawfull, because the Lord saith, Mat. 5. Ye shal in no wise sweare: And yet he ȳ by reason of the said words will hold that it is not lawfull in no case to sweare erreth in consciēce, for he hath not the perfit knowledge and vnderstanding of the truth of the said gol-pel, nor he reduceth not the saying of scripture to other scriptures, in which it is granted that in some case an oath may be lawful, & the cause

why

why conscience may so erre in the said case, & in other like, is because conscience is formed of a certain proposition or questiō grounded particulerly vpon vniuersal rules ordeined for such things as are to be done: And because a particuler proposition is not knowne to himself, but must appeare & be searched by a diligent search of a reason, therfore in search & in the cōscience ỳ should be formed therupon may happen to be error, & thereupon it is said ỳ there is error in conscience: which error cōmeth either because he doth not assent to ỳ he ought to assent vnto, or els because his reason whereby he doth refer one thing to another, is deceiued. For further declaratiō wherof it is to vnderstand that error in cōscience commeth 7. maner of waies. First is through ignorance: & ỳ is when a man knoweth not what he ought to do, and then he ought to aske coūsel of them ỳ he thinketh most expert in ỳ science, whervpon his doubt riseth. And if he can haue no coūsel, thē he must wholy cōmit him to God, & he of his godnes will so order him, that he wil saue him frō offēce. The second is through negligēce, as when a man is negligent to search his owne conscience, or to enquire the trueth of other. The 3. is through pride, as when he wil not meeken himselfe, ne beleeue them that be better & wiser than he is. The fourth is through singularity, as when a man followeth his owne wit, and will not cōforme himselfe to other, nor follow the good common wayes of good men. The fift is thorough an inordinat affection to himselfe, wherby hee maketh conscience to follow his desire,

& so he causeth her goe out of her right course. The 6. is through pusillanimitie, whereby some persõ dreedeth oft times such things as of reason hee ought not to dread. The 7. is through perplexitie, & this is whẽ a mã beleeueth himselfe to be so set betwixt two sins, that her thinketh it impossible, but that he shall fall into the one, but a mã can neuer be so perplexed in deed but through an error in conscience, & if hee will put away that error he shall be deliuered: therfore I pray thee that thou wilt alwaies haue a good conscience, and if thou haue so, thou shalt alwaies be mery, & if thine owne heart reprone thee not, thou shalt alwaies haue inward peace. The gladnes of righteous men is of God & in God, & their ioy is alwaies in truth and goodnes. There be many diuersities of conscience, but there is none better than that, whereby a man truly knoweth himselfe. Many men know many great & high cũning things, & yet know not themselues, and truly he that knoweth not himselfe knoweth nothing well. Also he hath a good & cleane conscience, that hath puritie and cleanes in his heart, truth in his word, & righteousenes in his deed. And as a light is set in a lantern that all that is in the house may be seen thereby, so almightie God hath set cõscience in the midst of euery reasonable soule as a light whereby he may discern & know what he ought to do, & what he ought not to do. Therefore for asmuch as it behoueth thee to bee occupied in such things as pertaine to the law: It is necessarie that thou euer hold a pure & clean conscience, specially in such things as cõcern restitution:

tion: for the sin is not forgiuen but if the thing that is wrongfully taken be restored. And I counsell thee also ỹ thou loue that is good, & flie that is euil, & that thou doe to another as thou wouldest should be done to thee, & that thou do nothing to other that thou wouldst not should be done to thee: That thou do nothing against truth, that thou liue peaceably with thy neighbor, and that thou do Iustice to euery man as much as in thee is: And also that in euerie generall rule of the law, thou doe obserue & keepe equitie: & if thou do thus, I trust the light of the lanterne, ỹ is thy conscience, shall neuer be extincted. &c. But I pray thee shew me what is that equitie that thou hast spoken of before, & that thou wouldst that I should keepe. Do. I will with good wil shew thee somwhat thereof.

¶ What is Equitie.

Cap. 16.

EQuitie is a rightwisenes that cõsidereth all the particuler circũstances of the deed, the which also is tẽpered with the sweetnesse of mercie. And such an equitie must alwaies be obserued in euery law of man, & in euerie generall rule therof, & that knew he wel, that said thus, lawes couet to be ruled by equitie. And the wise man saith, be not ouermuch rightwise: for the extreme rightwisenes is extreme wrong, as who saith, if thou take al that the words of the law giueth thee, thou shalt sõtime do against the law: & for the plainer declaration what equitie is, thou shalt vnderstand,

that sith ỹ dedes & acts of men, for which lawes bin ordained, happē in diuers maners infinitly: It is not possible to make any general rule of ỹ law, but ỹ it shal faile in some case, & therfore makers of lawes take hed to such things as may often come, & not to euery particuler case, for they could not though they would. And therefore to follow the wordes of ỹ law were in some case both against iustice & ỹ cōmō weith. Wherfore in some cases it is necessary to leaue the wordes of the law, & to follow that reason & iustice requireth, & to that intent equity is ordeined: that is to say, to temper & mitigate the rigor of the Law. And it is called also by some men Epicaia, the which is no other thing but an exception of the law of God or of the law of reason frō the general rules of the law of man, when they by reason of their generalty would in any particuler case iudge against the law of God, or the law of reason, the which exception is secretly vnderstood in euerie general rule of euery positiue law. And so it appeareth that equity taketh not away the very right, but only that, that semeth to bee right by the generall wordes of ỹ law: nor it is not ordayned against ỹ crueltie of the law, for the law in such case generally taken is good in himselfe, but equitie followeth ỹ law in all particuler cases where right and Iustice requireth, notwithstanding the general rule of the law be to the contrary: wherfore it appeareth ỹ if any law were made by a man without any such exceptiō expressed or implied, it were manifestly vnreasonable, & were not to be suffered: for such cases might

come

come that he that would obserue ẏ law should break both the law of God & the law of reasõ. As if a man make a vow that he wil neuer eat whitemeat, & after it happeneth him to come there where he can get no other meat. In this case it behoueth him to breake his auow, for ẏ particuler case is excepted secretly frõ his generall auow by his equitie or Epicay, as it is said before. Also if a law were made in a citie, that no man vnder the paine of death should open the gates of the citie before the Sunne rising: yet if the citizens before that houre flying from their enemies come to the gates of the city, & one for sauing of the citizens openeth the gates before ẏ houre appointed by the law, yet he offendeth not the law, for that case is excepted from the said generall law by equitie, as is said before: & so it appeareth that equity rather followeth the intent of the law, thã ẏ words of the law. And I suppose ẏ there be in likewise some like equities grounded vpon the generall rules of the law of ẏ realm. s. Ye verely, whereof one is this, there is a general prohibition in the laws of Englãd, that it shal not be lawfull to any mã to enter into the freehold of another without authoritie of the owner or the Law: but yet it is excepted frõ the said prohibitiõ by the law of reason, that if a man driue beasts by the high way, & the beasts happen to escape into the corne of his neighbour, & he to bring out his beasts that they should doe no hurt, goeth into the ground, & fetteth out the beasts, there he shall iustifie that entrie into the ground by the Law. Also notwithstanding the Statute

of Ed.3. made the 14. yere of his raigne, where-by it is ordained, that no man vpon pain of imprisonment should giue any almes to any valiant begger, that is well able to labor: yet if a man met with a valiant begger in so cold a weather and so light apparel, that if he haue no clothes he shal not be able to come to any towne to haue succour, but is likely rather to dye by the way, & he therefore giueth him apparell to saue his life, he shall be excused by the sayd statute, by such an exception of the law of reason as I haue spoken of. Do. I know well that as thou saist he shalbe excepted of the said statute by conscience, & ouer that, ỹ he shall haue great reward of God for his good deed, but I would wit whether the party shal be so discharged in the cõmon law, by such an exception of the law of reason, or not, for though ignorance vnuincible of a statute excuse the partie against god, yet (as I haue heard) it excuseth not in the lawes of the realme, ne yet Chancery, as some say, although the case be so that the party to whom the forfeiture is giuen may not with conscience leaue it. St. Verely, by thy question thou hast put me in a great doubt, wherefore I pray thee giue me a respite therein to make thee an answer, but as I suppose for ỹ time (howbeit I will not fully affirme it to be as I say) it should seeme that he should well plead it for his discharge at the common Law, because it shall be taken that it was the intent of the makers of the statute to except such cases. And ỹ judges may many times iudge after the mind of the makers as farre as the letter may suffer

and

and so it seemeth they may in this case. And diuers other exceptions there be also from other generall grounds of the law of the Realme by such equitie, as thou hast remembred before, that were tw long to rehearse now. Doct. But yet I pray thee shew me shortly somewhat more of thy mind vnder what manner a man may be holpen in this realme by such equitie. s. I will with good will shew thee somewhat therein.

¶ In what manner a man shall be holpen by equitie in the Lawes of England.

Cap. 17.

FIrst it is to be vnderstood, there be in many cases diuers exceptions frō the generall grounds of the law of the realme by other reasonable grounds of the same law, whereby a man shall be holpen in the common law. As it is of this generall ground, that it is not lawfull for any man to enter vpon a Discent, yet the reasonableness of the Law excepteth from the ground, an Infant that hath right, & hath suffered such a Discent, & him also that maketh continuall claime, and suffereth them to enter, notwithstāding the discent. And of that exceptiō they shal haue aduantage in the cōmō law. And so it is likewise of diuers Statutes, as of ꝑ statute whereby it is prohibited, that certain particuler tenāts shal do no waste, yet if a lease for terme of yeres be made to an infant that is within yeres of discretion, as of the age of v. or vj. yeres, & a stranger do waste, in this case this in-

infant shall not be punished for the waste, for he is excepted & excused by the law of reason. And a woman couert to whom such a lease is made after the couerture, shall be also discharged of waste after her husbands death, by a reasonable Maxime & custome of the realme. And also for reparations to be made vpon the same ground it is lawfull for such particuler tenants to cut down trees vpon the same ground to make reparations. But the cause there as I suppose is, for that the mind of the makers of the said estatute, shalbe take to be, that that case should be excepted. And in all these cases the parties shalbe holpen in the same court, & by the cõmõ Law: & thus it appeareth that sometime a mã may be excepted from the rigor of a Maxim of the law by another Maxime of the Law. And sometime from the rigor of a statute by the law of reason, & sometime by the intent of the makers of the stat. but yet it is to be vnderstood that most cõmonly, where any thing is excepted from the generall customs or Maximes of the Lawes of the Realme by the law of reason, the party must haue his remedy by a writ that is called Subpena, if a Subpena lye in the case. But where a Subpena lyeth, & where not, it is not our intent to treat of at this time. And in some cas there is no remedy for such an equity by way of compulsion, but all remedie therein must be cõmitted to the cõscience of the party. Doct. But in case where a Subpena lyeth, to whom shal it be directed, whether to ye Judge, or the party. st. It shall neuer be directed to the Judge, but to the party plaintife or to his Attourney,

tourney, and thereupon an Iniunction commaunding them by the same vnder a certaine paine therin to be contained, that he proceed no further at the common Law, til it be determined in the Kings Chaunceric, whether the plaintife hath title in conscience to recouer, or not. And when the plaintife by reason of such an Iniunction ceaseth to aske any further processe. The Iudges will in likewise cease to make any further processe in that behalfe.

Do. Is there any mention made in the law of England of any such equities. stu. Of this terme Equitie, to the intent that is spoken of here, there is no mention made in the Law of England, but of an Equity deriued vpon certaine statutes, mention is made many times & often in the Law of England: But that equity is al of another effect thā this is. But of the effect of this Equitie that we now speake of, mention is made many times: for it is oftimes argued in the Law of England, where a Subpena lyeth, and where not, and daily Bils be made by men learned in the Law of this Realme, to haue Subpenas. And it is not prohibited by the Law, but that they may well doe it, so that they make them not, but in case where they ought to be made, and not for vexation of the partie, but according to the truth of the matter. And the Law will in many cases that there shall be such remedie in the Chancerie vpon diuers things grounded vpon such Equities, and then the Lord Chaunceilour must order his conscience after the rules and grounds of the Law of the realme,

to

inſomuch that it had not beene inconuenient to haue aſſigned ſuch remedie in the Chancerie vpon ſuch equities for ỹ ſeuenth ground of the Law of Englãd: but forasmuch as no record remaineth in the kings Court of no ſuch Bil, ne of the writ of Subpena or Iniunctiõ, that is ſued thereupon, therefore it is not ſet as for a ſpeciall ground of the law, but as a thing that is ſuffered by the law. D. Then ſith the parties ought of right in many caſes to bee holpen in the Chauncerie vpon ſuch equities: it ſeemeth that if it were ordained by Statute, that there ſhould be no remedie vpon ſuch equities in the Chauncerie, nor in none other place, but that euerie matter ſhould be ordered onely by the rules and grounds of the common Law, that the Statute were againſt right & conſcience. St. I thinke the ſame, but I ſuppoſe there is no ſuch ſtatute. Do. There is a ſtatute of that effect, as I haue heard ſay, wherein I would gladly heare thy opinion. Stu. Shew me that ſtatute and I ſhall with good will ſay as me thinketh therein.

¶Whether the ſtatute hereafter rehearſed by the Doctor, be againſt conſcience, or not.

Cap. 18.

There is a Stat. made in the 4. yere of K. H. 4. cap. 22. whereby it is enacted that iudgement giuen by ỹ kings courts, ſhal not be examined in the Chancery, Parliamẽt, nor

noz elſewhere, by which Statute it appeareth that if any Iudgement be giuen in the kings courts againſt an equity oz againſt any matter of conſcience, that there can be had no remedy by that equitie, foz the iudgemẽt cannot be reformed without examination, and the examination is by the ſaid ſtatute prohibited, wherefoze it ſeemeth that the ſaid ſtatute is againſt conſcience: what is thine opinion therein?

St. If iudgement giuen in the kings courts ſhould be examined in the Chancery befoze the kings councell, oz any other place, the plaintifes oz demaundants ſhould ſeldome come to the effect of their ſuit, ne the law ſhould neuer haue end. And therefoze to eſchew that inconuenience that ſtatute was made. And though paraduenture by reaſon of that Stat. ſome ſinguler perſon may happen to haue loſſe: Neuertheleſſe the ſaid ſtatute is verie neceſſarie, to eſchew many great vexations and vniuſt expences, that would elſe come to many plaintifes that haue rightfwiſely recouered in the kings Courts. And it is much moze prouided foz in the law of Englãd that hurt noz damages ſhould not come to many, than only to one. And alſo the ſaid ſtatut doth not prohibit equity, but it prohibiteth onely the examination of the iudgement foz the eſchewing of the inconuenience befoze rehearſed. And it ſeemeth that the ſaid ſtatut ſtandeth with good conſcience: & in many other caſes where a man doth wrong yet he ſhal not be cõpelled by way of compuliſion to reformе it, foz many times it muſt be left to ỹ conſciẽce of the party, whether he will re-

dreſſe

dresse it or not. And in such case hee is in conscience aswel bound to redresse it if he will saue his soule, as hee were if hee were compellable thereto by the law, as it may appeare in diuers cases that may bee put vpon the same ground. Doct. I pray thee put some of these cases for an example. Stu. If the defendant wage his law in an action of debt brought vpon a true debt, the plaintif hath no means to come to his debt by way of compulsion, neither by Sub pena, nor otherwise, & yet the defendant is bound in conscience to pay him. Also if the grand Iurie in attaint affirme a false verdict giuen by the petie Iurie, there is no further remedie but the Conscience of the partie. Also where there can bee had no sufficient prowfe, there can bee no remedie in the Chauncerie, no more than there may bee in the spirituall Court. And because thou hast giuen an occasion to speake of cõscience I would gladly heare thy opinion where cõscience shall bee ruled after the law, & where the law shal be ruled after cõscience. D. And of that matter I would likewise gladly heare thy opinion, specially in cases grounded vpon the lawes of England, for I haue not heard but little thereof in time past: but before thou put any case thereof, I would that thou wouldest shew me how these two questions after thy opinion are to be vnderstood.

¶ Of what Law this question is to bee vnderstood: that is to say, where conscience shall be ruled after the Law.

Cap. 19.

The

The law whereof mention is made in this question, that is to say, where conscience shall be ruled by the law, is not as me seemeth to be vnderstood only of the law of reaſō, & of the law of God, but also of the law of mā, ꝑ is not contrarie to the law of Reason, nor the law of God, but ꝑ it is superadded vnto them for the better ordering of the coumonwealth: for such a law of man is alwaies to be set as a rule in conscience, so that it is not lawfull for a man to frame it on the one side, ne on thother, for such a law of mā hath not onely the strēgth of mans law, but also the Law of Reason, or of the Law of God, whereof it is derived: for Laws made by man, which haue receiued of God power to make Lawes, be made by God. And therefore conscience must be ordered by ꝑ law, as it must be vpon the law of God, & vpon the law of reason. And furthermore the Law whereof mention is made in the later end of ꝑ Chapter next before, that is to say, in the question wherein it is asked where the Law is to be left & forsaken for cōscience, is not to be vnderstood of the law of reason, nor of the law of God: for the two lawes may not be left, nor it is not to bee vnderstood of the law of man, that is made in particuler cases, and that is consonant to the law of reason, & to the law of God, and that yet that law should bee left for conscience: for of such a law made by man, conscience must be ruled, as it is said before: nor it is not to be vnderstood of a law made by mā cōmanding or prohibiting any thing to be done that is against the law of reason, or the law of god.

For

For if any law made by man, bind any person to any thing that is against the said lawes, it is no law, but a corruption and a manifest error. Therefore after them that be learned in the lawes of England, the said question, that is to say, where the law is to be left for conscience, and where not, it is to be understood in diuers maners, and after diuers rules, as hereafter shall somewhat be touched.

First, many vnlearned persons beleue that it is lawful for them to do with good conscience all things, which if they do them, they shall not be punished therefore by the Law, though the law doth not warrant them to do that they do, but onely when it is done, doth not for some reasonable consideration punish the that doth it, but leaueth it onely to his conscience. And therefore many persons do oft times that they should not do, & keepe as their owne that in conscience they ought to restore. Wherefore there is the lawes of England in this case.

If two men haue a sword iointly, & the one of them selleth the sword, and keepeth all the money wholy to himselfe: In this case his fellow shall haue no remedie against him by law, for as they when they toke the sword iointly, put each other in trust, and were content to occupie together: so the Law suffereth them to order the profits therof according to the trust that each of them put thother in. And yet if one toke all the profits, he is bound in conscience to restore the halfe to his fellow, for, as the Law giueth him right only to halfe the land, so it giueth him right onely in conscience

science to the halfe profits. And yet neuertheiesse it cannot be sold in that case, that the law is against conscience, for the law neither willeth ne cõmandeth that one should take all the profits, but leaueth it to their conscience: so that no default can be found in the law, but in him that taketh all the profits to himselfe may be assigned default, which is bound in cõscience to reforme it, if hee will saue his soule, though he cannot be compelled therto by the law. And therefore in this case & other like, that opinion which some haue, that they may doe with cõscience, all that they shall not bee punished for by the law if they doe it, it is to bee left for conscience: but the Law is not to bee left for conscience.

Also many men think that if a man haue land that another hath title to, if he that hath ꝑ right shall not by the action that is giuen him by the law to recouer his right by, recouer damages, that then he that hath the land is also discharged of damages in conscience, & that is a great error in conscẽce: for though he cannot be cõpelled to yeeld the damages by no mans Law, yet hee is compelled thereto by the law of reason, & by the law of God, whereby we be bound to doe as wee would bee done to, and that wee should not couet our neighbors goods: & therefore if tenant in taile be disseised and the disseisor dyeth seised, and then the heire in the taile bringeth a Formedõ & recouereth the land & no damages, for the law giueth him no damage in that case, yet the tenant by conscience is bound to yeeld damages to the heire in taile from the

death of his auncestor. Also it is taken by some men, that the law must bee left for conscience, where the law doth not suffer a man to deny ꝑ he hath before affirmed in Court of Record, or for that he hath wilfully excluded himself therof for some other cause: as if the daughter that is only heir to her father, will sue liuery with her sister that is a bastard, in that case she shall not be after received to say, that her sister is a bastard, in somuch that if her sister take halfe the land with her, there is no remedie against her by the law. And no more there is of diuersitie in other estopples, which were too long to rehearse now. And yet the partie that may take aduãtage of such an estopple by ꝑ law is boũd in conscience to forsake that aduantage, specially if he were so estopped by ignorance, & not by his owne knowledge & assent. For though the law in such cases giueth no remedie to him that is estopped, yet the law iudgeth not that the other hath right vnto the thing that is in variance betwixt them. And it is to be vnderstood ꝑ the law is to be left for cõscience, where a thing is tried and found by verdict against the truth, for in the common law the iudgemẽt must bee giuen according as it is pleaded and tried, like as it is in other laws, that the iudgement must bee giuen according to that, that is pleaded and proued. And it is to bee vnderstood that the law is to be left for conscience, where the cause of the law doth cease, for when the cause of the Law doth cease, the Law also doth cease in conscience, as appeareth by this case hereafter following.

A man maketh a leafe for term of life, & after a ſtranger doth waſt, wherefore the leſſee bringeth an action of Treſpas, & hath iudgement to recouer damages, hauing regard to the treble damages that he ſhal yeld to him in the reuerſion. And after he in the reuerſion before action of waſt ſued, dieth, ſo that the action of waſt is thereby extincted: then the tenant for terme of life (though hee may ſue execution of the ſaid iudgement by the law) yet he may not doe it by conſcience, for in conſcience hee may take no more thā he is hurted by the ſaid Treſpas, becauſe he is not charged ouer with the treble damages to his leſſor. Alſo it is to be vnderſtood where a law is grounded vpon a preſumption, if the preſumption be vntrue, then the Law is not to be holden in cōſcience. And now I haue ſhewed thee ſomewhat of the queſtion, that is to ſay, where the law ſhalbe ruled after conſcience, I pray thee ſhew mee whether there be not like diuerſities in other laws, betwixt law & conſcience. D. Yes verily, very many, whereof thou haſt recited one before, where a thing that is vntrue is pleaded, and proued, in which caſe iudgement muſt be giuen according, as well in the law Ciuill, as in law Canon. And another caſe is, that if the heire make not his Inuentory, he ſhall bee bound after the law Ciuill to all the debts, though the goods amount not to ſo much: And the law Canon is not againſt that Law, and yet in conſcience the heyre which in the Lawes of England is called an Executour is not in that caſe charged to the debts, but according to the value of the goods.

And now I pray thee shew mee some cases, where conscience shall bee ruled after the law. S. I wil with good wil shew thee somewhat as me thinketh therein.

¶ Here followe diuers cases, where conscience is to be ordered after the law.

Cap. 20.

THe eldest sonne shall haue & enioy his fathers lands at the cõmon law in conscience, as he shal in the law. And in Burgh-english the younger sonne shal inioy the inheritance, & that in conscience. And in Gauelkind all the sonns shall inherit the land together as daughters, at the cõmon law & that in cõscience. And there cã be none other cause assigned why cõscience in the first case is with the eldest brother, & in the second with the younger brother, & in the 3. case with al the brethren, but because the law of Englãd by reasõ of diuers customes doth sometime giue the land wholy to the eldest sonne, somtime to the youngest, & somtime to all. Also if a man of his meere motion make a feoffemẽt of two acres of lãd lying in two seuerall shires, & maketh liuery of seisin in the one acre in the name of both. In this case the feoffee hath right but only in the acre whereof liuerie of seisin was made, because he hath no title by the Law: but if both acres had bin in one shire he had had good right to both. And in these cases the diuersity of the law maketh the diuersitie of conscience.

Also

Also, if a mā of his mere motiō make a feffe-ment of a Manor, & saith not, to haue & to hold &c with the appurtenāces, in that case the feffee hath right to the demesne Lands, and to the rents, if there be attornements, & to the cōmon pertaining to the Manner, but hee hath neither right to the aduowsōs appēdāt, if any be, nor to the villeins regardant: but if this terme, with thappurtenances, had bin in the deed, the feoffee had right in conscience aswell to the aduowsons and villeins, as to the residue of the Manor: but if the king of his mere motiō giue a Manor with thappurtenances, yet the donee hath neither right in law nor conscience to the aduowsons nor villeins. And the diuersitie of the Law in these cases make the diuersitie of conscience.

Also, if a man make a lease for terme of yeres yeelding to him & to his heirs a certain rēt vpon condition, that if the rent be behind by xl. daies &c. that then it shalbe lawful to the lessor & his heirs to reenter: And after the rent is behind, the lessor asketh the rent according to the law, & it is not payed, the lessor dieth, his heire entreth. In this case his entrie is lawfull both in law and conscience: but if the lessor had died before he had demanded the rent, and his heire demanded the rent, & because it is not paied he reentreth, in that case his reēntrie is not lawfull neither in law nor conscience.

Also, if the tenāt in dower sow her land & dy before the corne is ripe, the corne in conscience belongeth to her executors, & not to him in the reuersion: but otherwise it is in conscience of

grasse and fruits. And the diuersitie of the law maketh there also the diuersitie in conscience.

Also, if a man seised of lands in his demesne as of fee, bequeath the same by his last will to another, & to his heires, & dieth: In this case ꝯ heire notwithstanding the will, hath right to the land in conscience. And the reason is, because the law iudgeth that will to be void, & as it is void in the law, so it is void in conscience.

Also, if a man grant a rent for terme of life, & make a lease of lād to the same grātee for terme of life, & the tenant alieneth both in fee: In this case hee in the reuersion hath good tilte to the land both in law and conscience, and not to the rent. And the reason is, because the land by the Alienation is forfeit by the law to him in the reuersion, and not the rent.

Also, if lands be giuen to two men and to a woman in fee, & after one of the men entermarieth with the woman, and alieneth the land & dyeth: In this case the woman hath right but onely to the third part, but if the mā & the woman had beene maried together, before the first feoffement, then the woman notwithstanding the alienation of her husband, should haue had right in law & conscience to the one halfe of the land. And so in these two cases conscience doth follow the Law of the Realme. Also if a man haue two sonnes, one before espousels, and another after espousels, and after the father dieth seised of certaine lāds: In this case the yōger sonne shall enioy the lands in this Realme, as heire to his father both in law and conscience. And the cause is, because that sonne born after

espou-

espousals, is by the law of this realme the verie heire, and the elder son is a bastard. And of these cases and many other like in the laws of England may be formed the Silogisme of conscience, or the true iudgement of conscience in this maner. Sinderisis ministreth the Maior thus: rightwisenes is to be done to euery mā, vpon which Maior the law of England ministreth the Minor thus: The inheritance belongeth to the son borne after espousels, & not the son borne before espousels, then conscience maketh the conclusion, & saith, therfore the inheritāce is in conscience to be giuen to the son borne after espousels. And so in other cases infinit may be formed by the law of the Silogisme or the right iudgement of cōscience: wherefore they that be learned in the law of the realm, say that in euerie case, where any law is ordained for the dispositiō of lāds & goods, which is not against the law of god, nor yet against the law of reason, that the law bindeth all them that be vnder the law of the Court of conscience, that is to say, inwardly in his soule. And therefore it is somewhat to maruaile that spirituall men haue not indeuored themselues in time past to haue more knowledge of the kings laws than they haue done, or that they yet doe: for by the ignorance therof they be oft times ignorant of that that should order thē according to right & Justice, as well concerning themselues as other that come to them for Counsaile. And now forasmuch as I haue aunswered to thy questions as well as I can: I pray thee that thou wilt shew mée thy opinion in diuers

cases formed vpon the law of England wherin I am in doubt, what is to be holden therin in conscience. D. Shew me thy questions, & I will say as me thinketh therein.

¶ The first question of the Student.

Cap. 21.

IF any infãt that is of the age of xx. yeres, & hath reason & wisedome to gouerne himselfe selleth his land, & with the mony therof buyeth other Land of greater value than the first was and taketh the profits thereof, whether may the infant alke his first land againe in cõscience, as he may by the law. D. What thinkest thou in that question? S. Me semeth that forasmuch as the law of England in this article is grouñded vpon a presumption, that is to say, that infants commõly afore they be of the age of xxj. yeres be not able to gouern themselues, that yet forasmuch as that presumption sayleth in this infant, that he may not in this case with conscience alke the Land againe that he hath sold to his great aduantage, as before appeareth. D. Is not this sale of the infant & the feffement made therupon, if any were, voidable in the law? S. Yes verely. D. And if the feffee haue no right by the bargaine, nor by the feffement made thereupon, whereby should he then haue right therto as thou thinkest? S. By conscience as me thinketh, for the reason that I haue made before. D. And vpon what Law should that conscience be grounded, that thou spea-

speakest of, for it cannot be granted by the law of the Realme, as thou hast sayd thy selfe. And me thinketh that it cannot be grounded vpon the law of God, nor vpon the Law of reason, for feoffements nor contracts be not grounded vpon neither of those lawes, but vpon the law of man. St. After the law of property was ordeined, the people might not conueniently liue together without contracts, & therefore it seemeth that contracts be grounded vpon the law of reason, or at the least, vpon the law that is called Ius gentium. Do. Though contracts be grounded vpon the Law that is called Ius gentium, because they be so necessarie & so generall among all people, yet that proueth not that contracts be grounded vpon the Law of reason: for though the Law called Ius gentium be much necessarie for the people, yet it may be changed. And therefore if it were ordeined by statute that there should be no sale of land, ne no contract of goods, and if any were, that it should be void, so that euerie man should continue still seised of his lands and possessed of his goods, the statute were good. And then if a man against that statute sold his land for a summe of money, yet the seller might lawfully retaine his land according to the statute. And then he were bound to no more but to repay the money that he receiued with reasonable expences in that behalf. And so in likewise me thinketh that in this case the infant may with good conscience reenter into his first land: because the contract after the Maximes of the law of the Realme is void, for as I haue heard the

Maximes

Maxims of the law be of as great strength in the Law as statutes. And some thinke that in this case the infant is bound to no more, but only to repay the money to him that he sold his land vnto, with such reasonable costes & charges as he hath sustained by reason of the same. But if a man sell his lād by a sufficient & lawfull contract, though there lack liuerie of seisin or such other solemnities of the Law, yet the seller is bound in conscience to performe the contract. But in this case the cōtract is insufficient, and so me thinketh great diuersitie betwixt the cases. Stu. For this time I hold me contented with thy opinion.

¶ The second question of the Student.

Cap. 22.

IF a man that hath lands for terme of life, be impanelled vpon an Inquest, & thereupō leseth issues & dieth, whether may those issues be leuied vpon him in the reuersiō in conscience as they may be by the law? D. If they may be leuied by the law, what is the cause why thou dost doubt whether they may be leuied by conscience? S. For there is a Maxime in the lawes of England, that where two Titles run together, the eldest title shall be preferred. And in this case the title of him in the reuersion, is before the title of the forfeiture of the issues. And therfore I doubt somewhat whether they may be lawfully leuied. D. By that reason it seemeth thou art in doubt what the law is in this

case,

case, but that must necessarily be knowne, for els it were in vaine to argue what conscience will therein. S. It is certain that ỹ law is such, & so it is likewise if the husband forfeit issues, and die, those issues shall be leuied on the lands of the wife. D. And if the law be such, it semeth that conscience is so in likewise, for sith it is the law, that for execution of iustice euery man shal be impanelled when need requireth, it semeth reasonable, that if he will not appear, that he should haue some punishmēt for his not apparance, for els the law should be cleerely frustrate in that point. And the paine, as I haue heard, is, that he shal lose issues to the king for his not apparance: wherefore it semeth not inconuenient nor against cōscience, though the law be, that those issues shal be leuied of him in the reuersion, for that the cōdition was secretly vnderstood in the law, to passe with the lease when the lease was made. And therefore it is for the lessor to beware & to preuent the danger at the making of the lease, or els it shall bee adiudged his owne default. And then this particuler Maxime whereby such issues shall be leuied vpon him in the reuersion, is a particuler exception in the law of England from the generall Maxime that thou hast remembred before, that is to say, ỹ where two titles run together, that the eldest title shalbe preferred, & so in this case the generall Maxime in this point shall hold no place, neither in law, nor in cōscience, for by this particuler Maxime ỹ strēgth of ỹ general Maxime is restrained to euery intent, ỹ is to say, aswell in law as in conscience.

The

The 23. Chapter.

¶ The third queſtion of the Student.

Cap. 23.

IF a Tenant for terme of life, or for terme of yeres, do waſt, whereby they be bound by the lawes to yeld to him in the reuerſion treble damages, & ſo ſhall forf. the place waſted, whether is he alſo bound in conſcience to pay thoſe damages, & to reſtore that place waſted immediatly after the waſt done, as he is in the ſingle damages, or that he is not bound thereto till the treble damages, & place waſted, be recouered in the kings court. D. Before iudgement giuen in the treble damages & of the place waſted, he is not bound in conſcience to pay them, for it is vncertaine what he ſhould pay: But it ſufficeth that he be readie till iudgement be giuen to yeld damages according to the value of the waſt, but after the iudgement giuen, hee is bound in conſcience to yeld the treble damages, & alſo the place waſted. And the ſame law is in all ſtatutes Penal, that is to ſay, that no man is bound in conſcience to pay the penaltie till it be recouered by the law. S. Whether may he that hath offended againſt ſuch a ſtatute penal, defend the action & hinder the iudgement, to the intent he would not pay the penaltie, but onely ſingle damages. D. If the action be taken right wiſely according to the Statute, and vpon a iuſt cauſe, the defendant may in no wiſe defend the action, vnleſſe he haue a true dilatorie matter to plead, which ſhould bee hurtfull to him if he pleaded not, though he be

not

not bound to pay the penaltie till it bee recouered,

The fourth question of the Student.

Cap. 24.

IF a man enfeoffe other in certain land vpon conditiõ, that if he enfeoffe any other, that it shalbe lawful for the feoffor & his heirs to reenter, &c. whether is this condition good in cõscience, though it be void in the law? D. What is the cause why this condition is void in the law? S. The cause is this, by the law it is incident to euerie state of fee simple, that hee y hath the estate, may lawfully by the law, and by the gift of the feoffor, make a feoffement thereof: And then when y feoffor restraineth him after, that hee shall make no feoffement to no man against his owne former graunt, & also against the puritie of the state of a fee simple, the law iudgeth the condition to be void, but if the condition had been, that he should not haue enfeoffed such a man, or such a man, that conditiõ had bin good, for yet he might enfeoffe other.

D. Though the said condition be against the effect of the state of a fee simple, & also against the law: neuertheless it is not against the intent that the parties agreed vpon, & that at the time of the liuery. And forasmuch as the intent of the parties was, y if the feoffee infeoffed any man of the land, that the feoffor should enter, and to that intent the feoffee tooke the state and after

after brake the intent, it seemeth that the lād in conscience should returne to the feoffor. S. The intent of the parties in the lawes of England is void in many cases, that is to say, if he be not ordred according to the law. And if a mā of his meere motion without any recompence, intending to giue lands to another, & to his heires, make a deed vnto him, whereby he giueth him those lāds, to haue and to hold to him for euer, intending that by the word (for euer) the feffee should haue the land to him & to his heires, in this case his intent is void, and the other shall haue the land onely for terme of life. Also if a man giue lands to another, & to his heires for terme of xx. yeares, intending, that if the feffee die within the terme, that the his heirs should enioy the land during the terme: In this case his intent is void, for by the law of the realme all chattels real & personal shal go to the executors, & not to the heir. Also if a man giue lands to a man and to his wife, & to the third person, intending that euery of them should take the third part of the land as three cōmon persons should. his intent is void, for the husband and the wife, as one person in the law, shal take only the one half, & the third persō the other halfe: but these cases be alwayes to be vnderstood wher the said estates bee made without any recompence. And forasmuch as in this principal case the intent of the feoffor is grounded against the Law, and that there is no recompence appointed for the feoffement, mee thinketh that the feoffor hath neither right to the Land by Law or conscience: for if hee should haue it by con-

conſcience, that conſcience ſhould be grounded vpon the law of reaſon, and that it cannot, for conditions bee not grounded vpon the Law of reaſon, but vpō the Maximes & cuſtoms of the realme: & therefore it might be ordeined by ſtatute that all conditions made vpon land ſhould be void. And when a condition is void by the Maximes of the law, it is as fully void to euery intent, as if it were made void by ſtatut, and ſo me thinketh that in this caſe the feoffor hath no right to the land in law nor in conſcience. D. I am content thy opinion ſtand til we ſhall haue hereafter a better leaſure to ſpeake farther in this matter.

¶ The fift queſtion of the Student.

Cap. 25.

IF a fine with proclamation be leuied according to the ſtatute, & no claime made within v yeres &c. whether is the right of a ſtrāger extincted therby in conſcience, as it is in the law? Do. Vpon what conſideration was that ſtatut made? St. That the right of lands and tenemēts might be the more certainly knowen, and not to bee ſo vncertaine as they were before that ſtatut. D. And when any law of man is made for a Common wealth, or for a good peace and quietneſſe of the people, or for any inconuenience or hurt to be ſaued from them, that law is good, though percaſe it extinct the right of a ſtranger, and muſt be kept in the Court of con-

conſcience: for as it is ſaid before in Ch. 4. By lawes rightwiſely made by man, it appeareth who hath right to the lands & goods, for whatſoeuer a man hath by ſuch a Law hee hath it rightwiſely. And whatſoeuer hee holdeth againſt ſuch a law he holdeth vnrightwiſely: & furthermore it is ſaid there, all the lawes made by man which bee not contrarie to the Law of God muſt be obſerued and kept, & that in conſcience. And he that deſpiſeth thē deſpiſeth god, and he that reſiſteth them, reſiſteth God. Alſo it is to be vnderſtood, that poſſeſſions and the right therof is ſubiect to the lawes, ſo that they therefore with a cauſe reaſonable may be trāſlated and altered from one man to another, by the act of the Law. And of this conſideration that law is grounded, that by a contract made in faires and markets, the property is altered, except the propertie be to the King, ſo that the buyer pay tol, or do ſuch other things as is accuſtomed there to be done vpon ſuch cōtracts, and that the buyer knoweth not the former propertie. And in the law Ciuil there is a like Law, that if a man haue anothers mans good with a title three yeares, thinking that he hath right to it, he hath the very right vnto the thing: and that was made for a law, to the intēt that the propertee and right of things ſhould not be vncertaine, and that variance and ſtrife ſhould not bee among the people. And forasmuch as the ſaid ſtatute was ordained to giue aſſeruraintie of title in the Lands and Tenements compriſed in the fine: It ſeemeth that that fine extincteth the title of all other, aſwell in con-

conſcience as it doth in the Law. And ſith I haue aunſwered to thy queſtion, I pray thee let me know thy mind in one queſtion concerning tailed lands, and then I will trouble thee no further at this time,

¶ A queſtion made by the Doctor, how certaine recoueries that be vſed in the Kings Courts to defeat tailed land, may ſtand with conſcience.

Cap. 26.

I haue heard ſay, ỹ when a man that is ſeiſed of lands in the taile, ſelleth the land. That it is commonly vſed, that he that buyeth the land, ſhall for his ſuretie, and for the auoyding of the Taile in that behalfe, cauſe ſome of his friends to recouer the ſaid lands againſt the ſaid tenant in taile: which recouery, as I haue bene credibly enformed, ſhalbe had in this maner: the demaundants ſhall ſuppoſe in their writ & declaration, that the tenant hath no entry, but by ſuch a ſtranger as the buyer ſhal liſt to name & appoint, where indeed the demaundants neuer had poſſeſſion thereof, nor yet the ſaid ſtraunger. And thereupon the ſaid tenant in taile ſhall appeare in the court, and by aſſent of the parties, ſhall vouch to warrant one ỹ he knoweth well hath nothing to yeeld in value. And the vouchee ſhall appeare, & the demãdãts ſhall declare againſt him, and therupon he ſhall take a day to emparle at the ſame terme, and at that day by aſſent and coupn of the parties, hee

shal make default, vpon which default because it is a default in despite of the Court, the demaundants shall haue iudgement to recouer against the tenãt in taile, and he ouer in value against the voucher, and this iudgement and recouerie in value, is taken for a bar of the taile for euer: how may it therfore be taken, that the law standeth with cõscience, that as it seemeth alloweth & fauoureth such fayned recoueries? St. If the tenant in taile sell the land for a certaine summe of money as is agreed betwixt thẽ at such a price as is commonly vsed of other lands, and for the suretie of the sale suffereth such a recouerie as is aforesaid, what is the cause that moueth thee to doubt whether the said contract, or the recouery made therupõ, for the suretie of the buyer that hath truely payed his money for the same, should stand with conscience? Do. Two things cause mee to doubt therein, one is for that, that after our Lord had giuen the land of Behest to Abraham and to his seed, that is to say, to his children in possession alway to continue, hee said to Moses, as it appeareth Leuit. 25. the land shall not bee sold for euer, for it is mine. And then our Lord assigned a certain maner how the land might bee redeemed in the peare of Iubilie if it were sold before: and forasmuch as our Lord would that the Land so giuen to Abraham and his children should not bee sold for euer, it seemeth that he doth against the ensample of God, that alieneth or selleth the land that is giuen to him and to his children, as lands intailed be giuen. Another cause is this: It appeareth by the com-

commaundement of God, that thou shalt not couet the house of thy neighbour &c. And if that concupiscence be prohibited, more ſtrōger then the vnlawfull taking and withholding thereof is prohibited: and forasmuch as tailed Land, when the auncestor is dead, is a thing that of right is belonging to his heire, for that he is heire according to the gift, how may the land with right or conscience be holden frō him?

S. Notwithstanding the prohibition of Almightie God, whereby the Land that was giuen to Abraham & to his ſeēd might not be aliened for euer, yet lāds within walled townes might lawfully bee aliened for euer, except the Lands of the Leuites, as it appeareth in the said Chapter of Leuitic. 25. And so it appeareth that the said Prohibition was not generall for euerie place, and that among the Iewes. And it appeareth also that it was giuen onely to Abraham and his children, and so it was not generally to all people. And it appeareth also that it extended not but onely to the Land of promission, as it appeareth by the wordes of the said Chapter, where it is said thus, all the region of our possession shall bee sold vnder the condition of redeeming: whereby appeareth that Lands in other Countries bee not bound to that condition, and as they bee not bound to that condition, by the same reason it followeth, that they bee not bound to the same succession. Therefore that said Law, that will that the Land giuen to Abraham and to his ſeēd shall not bee sould for euer,

bindeth no land out of the land of promission, & some men will say, that sithen the passion of our Lord was promulgate and knowne, bindeth not there. And to the second reason which is grounded upon the commandement of God: It must nedes be granted that it is not lawfull to any man unlawfully to couet the house of his neighbor, and that then more stronger he may not unlawfully take it from him: but then it remaineth for thee yet to prowe how in this case this tailed land that is sold by his auncestor, and whereof a recouery is had recorded in the kings court, may be said the lands of the heire. D. That may be proued by the law of the Realme, that is to say, by the statute of Westminster the second Ca. 1. where it is said thus, The will of the giuer expressely contained in the deed of his gift, shall bee from henceforth obserued, so that they to whom the tenements be so giuen, shal not haue power to alien, but that the lands after their death shall remaine to the issue or retourne to the donour, if the issue faile: By the which statute it appeareth euidently that though they to whom the tenements were so giuen, alened them away, that yet neuertheless they in law and conscience by reason of the said Statute ought to remain to their heires according to the gift, for it is holden commonly by all Doctours that the commaundements and rules of the law of man or of a positiue law that is lawfully made, bind all that be subiects to the law according to the minde of the maker, and that in the Court of conscience.

Stu.

S. Dost thou thinke that if a man offend against a statut Penal that he offendeth in conscience? Admit that he do it not of a wilful disobedience, or that he will not obey the law, for if he doe it of disobedience, I thinke he offendeth. D. If it be but onely a Statute that is called Popular, it bindeth not in conscience to the payment of the penalty, till it be recouered by the law, and then it doth bind in conscience: but if a statute be made principally to remedy the hurt of one partie, & for that hurt it giueth a penaltie to the partie, in that case the offendour of the Statute is bound immediatly to restore the damages to the value of the hurt, as it is vpon the statute of Wast, but ȳ penaltie aboue the hurt he is not bound to pay till iudgemēt be giuen as it is said before: but statutes by ȳ which it is alligned who shall haue right or propertie to these Lands and Tenements, or to these goods or cattels, if it be not against the law of God, nor against the law of reason, bind all them that be subiect to the law, in law and conscience, and such a statute is the statute of West. 2. wherof we haue treated before, wherfore it must be obserued in conscience.

S. But some hold that the statute of Westminster the second was made of a singularitie and presumption of many that were at the said Parliament, for exalting and magnifying of their owne bloud, and therefore they say that that statute made by such a presumption bindeth not in conscience.

D. It is verie perilous to iudge for certaine

that the ſaid Statute was made of ſuch preſumption as thou ſpeakeſt of: for there be many conſiderations to proue that the ſayd Statute was not made of ſuch preſumption, but rather of a verie good mind of all the Parliament, or at the leaſt of the more part thereof, & for the common wealth of all the reaime: & firſt in the King the which in the ſayd Parliament was the head, and moſt chiefe and principall part of the Parliament (as he is in euerie Parliament) cannot be noted to be ſuch intent: for it is not neceſſarie nor it was not then in vſe, that lands of the Crowne ſhould be entailed: and in ſpirituall men, ne yet in certaine Burgeſſes & Citizens of the ſaid Parliament which at that time had no land, there can be noted no ſuch ſingularity: nor yet in the Noble men and Gentlemen nor ſuch other as were of the ſayd Parliament and had Lands and tenements. It is not good to iudge in certaine that they did it of ſuch preſumption, but it is good and expedient in this caſe as it is in other caſes that be in doubt, to hold the ſurer way, & that is, that it was made of charitie, to the intent that he nor the heires of him to whom the land was giuen ſhould not fall into extreme pouertie, and thereby happely to run into offence againſt God. And though it were true as they ſay, that it was not made of charitie but of preſumption and ſingularitie as they ſpeake of: Neuertheleſſe foraſmuch as the ſtatute is not againſt the Law of God nor againſt the Law of Reaſon, it muſt be obſerued by all them that be Subiects vnto that

Law

Law. For as Iohn Gerson in the Treatise that he intituled in latine, De vita spirituali animæ, the fourth lesson, and the third corolary, saith, that God will that makers of Lawes iudge onely of outward things, and reserue secret things to him. And so it appeareth that man may not iudge of the inward intent of the deed, but of such things as bee apparant and certaine, but it is not apparant that there was any such corrupt intent in the makers of the said Statute: how may it therfore bee said that that Law is good or rightwise, that not only suffereth such things against the statute, but also against the commaundement of God? St. To that some aunswere and say, that when the land is sold, and a recouerie is had thereupon in the Kings Court of Record, that it sufficeth to barre the tayle in conscience, for they say, that as the tayle was first ordained by the Law, so they say that by the Law it is annulled againe. Do. Be thou thy selfe Iudge, if in that case there be like authority in the making of the taile, as there is in the annulling thereof: for it was ordained by authoritie of Parliament, the which is alway taken for the most high Court in this Realme before any other, and it is annulled by a false supposell, for that, that they that bee named demaundants should haue right to the land, where in trueth they had neuer right thereto: whereupon followeth a false supposell in the writ, and a false supposell in the declaration, and a voucher to warrant by coupn of such a person as hath nothing to yeld in value, and thereupon by couin

and collusion of the parties followeth the default of the vouchée, by the which default the iudgement shalbe giuē. And so all the iudgemēt is deriued & grounded of the vntrue suppose & couin of the parties, whereby the Law of the realme ꝑ hath ordained such a writ of Entre to help them that haue right to lāds or tenemēts is defrauded, the court is deceiued, the heire is disherited, & as it is to doubt, the buyer and the seller, their heirs & assignes hauing knowledge of the taile be bound to restitution, & verily I haue heard many times, that after the Law of the Realme such recoueries should be no barre to the heire in the taile, if the law of the realme might be therein indifferently heard. S. I cannot see but that after the Law of the realme it is a barre of the taile, for when the tenaunt in taile hath vouched to warrantie, & the vouchée hath appeared & entered into the warranty, and after hath made default in despite of the court, whereupon iudgement is giuen for the demandant against the tenant, & for the tenant that he shal recouer in value against the vouchée: if the heire in the taile should after bring his Formedon & recouer the lands entailed, and after the vouchée purchaseth lands, then should the heire also haue execution against him to the value of the lands entailed, as heire to his ancestor that was tenaunt in the first action, and so he should haue his owne lands, & also the lands recouered in value: & therfore because of the presumption that the vouchée may purchase lands after the iudgement, some be of opinion that it is in the law a good bar of the taile. D. I suppose

that

that in that cale thou haſt put, that the vouchée may barre the heire in taile of his recouerie in value, becauſe he hath recouered the firſt lãds. Neuertheleſs I will take a reſpit to be aduiſed of that recouerie in value. And if thou can yet ſhew mee any other conſideration why the ſaid recoueries ſhould ſtand with conſciẽce, I pray thée let mée heare thy conceit therein, for the multitude of the ſaid recoueries is ſo great, that it were great pity that all ſhould be bound to reſtitution that haue Lands by ſuch recouer-ries, ſith there is none (as far as I can heare) diſpoſe them to reſtore. Stu. Some men make another reaſon to proue that the ſayd recouer-ries ſhould be ſufficiẽt by the law to auoide the ſtatute of Weſt. then and if they bee ſufficient thereto, they be ſufficiẽt in conſcience. D. What is their reaſon therein? S. In the 7 yere of H. 8. ca. 4. among other things it is enacted, that all recouerers their heires and aſſignes, may ad-now and iuſtifie for rents, ſeruices, & cuſtomes by them recouered, as they againſt whom they recouered might haue done. And then they ſay that when the Parliament gaue to ſuch reco-uerers authoritie to auow and iuſtifie for ſuch rents, cuſtomes, and ſeruices, as they recoue-red, that the intent of the Parliament was, that ſuch recouerers ſhould haue right to that for the which they ſhould auow or iuſtifie: for elſ they ſay that it ſhould bee in vaine to giue them ſuch power, and that the Parliament ſhould elſe bee taken in maner as fortifiers of wrongfull title, and ſo they ſay that ſuch re-couerers by reaſon of the ſaid Statute haue

right

right by the law. D. That statute as it seemeth was made onely to giue to the recouerers, a forme to auow and iustifie which they had not before, though they had recouered vpon a good title. And the cause why they had no forme to auow or iustifie before the said Statute was, forasmuch as the recouerers did not by the pretence of their action, affirme the possession of him or them against whom they recouered, nor claimed not by them, but rather disaffirmed and destroyed their estate: And therefore they cannot alleadge any continuance of their title by them, as they may that haue rents or seruices, or such other of the graunt of other by deed or by fine. And therefore as it seemeth the most principall intent of the Statute was, that such recouerers should auow and iustifie for rents, seruices and customes, as they should or might do that had them by fine, or deed: not hauing any respect as it seemeth whether they recouered against tenant in fee simple, or in fee tayle, nor whether the recoueries were had vpon a rightfull title. And therefore as mee seemeth the said Statute neither affirmeth nor disaffirmeth the title of recouerers, whereby they doe auow: For if a man had right before the recouerie, the right should remaine vnto him notwithstanding the said Statute, and so me seemeth that the title of them that haue the land entayled by such recoueries, is nothing fortified nor affirmed by the said statute, but that they are in the same case as they were before, what thinkest thou therin? S. This matter is great, for as thou sayest there bee so many

that

that haue tailed lands by such recoueries, that it were great pitie and heauines to condemne so many persons, & to iudge that they all were bound to restitution. For I thinke there be but few in this realme that haue lands of any notable value, but that they or their ancestors, or some other by whom they claime, haue had part therof by such recoueries. Insomuch that Lords Spirituall and Temporall, Knights, Squires, rich men and poore, Monasteries, Colledges and Hospitals haue such lands, for such recoueries haue beene vsed of long time: who may thinke therefore without great heauinesse, that so many men should be bound to restitution, and that yet as thou saiest, no man disposeth him to make restitution. And so I am in manner perplexed and wot not what to say in this case, but that yet I trust that ignorance may excuse many persons in this behalf.

D. Ignorance of the deed may excuse but ignorance of the Law excuseth not, but it be inuincible, that is to say, that they haue done that in them is to know the trueth: as to counsaile with learned men, and to aske them what the Law is in that behalfe, and if they answer them, that they may do this or that lawfully, then they be therby excused in conscience. But yet in mans Law they be not thereby discharged, but they that haue taken vpon them to haue knowledge of the Law, be no: excused by ignorance of the Law, ne no more are they that haue a wilfull ignorance, and that would rather bee ignorant than to know the trueth. And therefore they will not dispose them to

aske

alke any Counsalle in it, and if it be of a thing that is against the Law of God, or the law of reason, no man shall be excused of ignorance, and so there bee but few that be excused by ignorance. S. What then, shall we condemne so many and so notable men? D. Wee shall not condemne them, but we shall giue them their perill. S. Yet I trust their daunger is not so great that they should be bound to restitution: For Iohn Gerson saith in his sayd booke called De vnitate Ecclesiastica, cõsideratione secunda, Quod communia error facit ius: that is to say, A common errour maketh a right, of which wordes as it seemeth some trust may be had, though it were fully admitted the said recoueries were first had vpon an vnlawfull ground, and against the good order of conscience, that yet neuertheless, forasmuch as they haue been vsed of long time, so that they haue bin taken of diuers men that haue bẽ right well learned, in maner as for a law, that the buyers partie be excused, so that they be not bound to restitution. And moreouer, it is certaine that the Statute of Westminster the second, nor none other statut made by man cannot be of greater value or strength, than was the bond of matrimony that was ordained of God. And though that bond of Matrimonie was indissoluble, yet neuertheless Moses suffered a bil of refusal of the Iewes, which in Latin is called Libellũ repudij, and so they might thereby forsake their wiues, as it appeareth Deutro. 23. and therefore like as a dispensation was suffered against that bond, so it seemeth it may be a-

gainst

against this statute. D. As to that reason that thou hast last made of a bill of refusall, let all purchasors of landheare what our Lord saith in the Gospell of the Iewes, of that bill of refusall, Mathew 19. where he saith thus, For the hardnes of your hearts Moses suffered you to leaue your wiues: for at the beginning it was not so. Of which words Doctours hold commonly that though such a bill of refusall was lawfull so that they that refused their wiues thereby, should be without paine in the law, & yet it was neuer lawfull so that it should bee without sin. And so likewise it may be said in this case that such recoueries bee suffered for the hardnesse of the hearts of Englishmen, which desire land & possession with so great greedinesse that they cānot be withdrawne frō it neither by the law of God nor of the realme: And therefore the rich men should not take the possessions of poore men from them by power, without colour of tytle, that is to say, neither by open Disseisin, or by the onely sale of the tenaunt in taile, and so to hold them against the expresse words of the statute, such recoueries haue bin suffered. And though for their great multitude they may happily be without paine as to the Law of the Realme: yet it is to feare that they bee not without offence, as against God: and as to the other reason, that a cōmon error should make a right, those words as me seemeth be to be thus vnderstood, that a custome vsed against the Law of man shall bee taken in some countries for law, if the people bee suffered so to continue. And yet some men call such a cu-

a custom an erroꝛ, because that the cõtinuance of that custome against the law was partly an errour in the people, foꝛ that they would not obey the Law that was made by their superiours to the contrarie of that Custome: but it is to bee vnderstood that the said recoueries though they haue beene long vsed, may not bee taken to haue the strength of a custome, foꝛ many as well learned as vnlearned haue alway spoken against them and yet doe. And furthermoꝛe as I haue heard say, a custome oꝛ a pꝛescription in this Realme against the statutes of the realm pꝛeuaile not in the law. S. T. hough a custome in this Realme pꝛeuaileth not against a Statute as to the Law, yet it seemeth that it may pꝛeuaile against the statute in conscience: foꝛ though ignoꝛance of a statute excuseth not in the law, neuertheleſſe it may excuse in conscience, and so it seemeth that it may do of a custome. Do. But if such recoueries cannot be bꝛought into a lawfull custome in the Law, it seemeth they may not bee bꝛought into a Custome in conscience, foꝛ conscience must alway bee grounded vpon some Law, and in this case it cannot be grounded vpon the law of reason, noꝛ vpon the Law of God: and thereforꝛe if the Law of man serue not, there is no ground whereupon conscience in this case may bee grounded, and at the beginning of such recoueries, they were taken to bee good because the Law should warrant them to bee good, and not by reason of any Custome, and so if the reason of the Law will not serue in the recoueryes, the custome cannot helpe, foꝛ an euill Custome

is

is to be put away. And therefore mee seemeth that the recoueries bee not without offence against god, though happily for their great multitude, and that there should not be as it were a subuersion of the inheritance of many in this Realme, as well of spirituall as temporall, they be without paine in the Law of the Realme, except such recoueries as by the cõmon course of the Law be voidable in the Law by reason of some vse, or of some other speciall matter: but what paine that is, I will not temerously iudge, but commit it to the goodnesse of our Lord, whose iudgements be verie deepe and profound, nor I will not fully affirme that they that haue lands by such recoueries ought to be compelled to restitution: but this seemeth to me to bee good counsell, that euery man hereafter hold that is certain, and leaue that is vncertaine, and that is, that hee keepe himselfe from such recoueries, and then hee shall be free from all scrupulousnesse of conscience in that behalfe.

Stu. It seemeth that in this question thou pondrest greatly the said statute of Westminster the second, and that though it be but onely a Law made by man, that yet forasmuch as it is not against the law of reason, nor the Law of God, thou thinkest that it must be holden in conscience: and ouer that as it seemeth thou art somewhat in doubt, whether those recoueries bee any barre to the heire in the taile by the law of the Realme, vnlesse that hee haue in value in land vpon the vouchee, and that thou wilt thereupon take a reioynder or thou shew thy

full

full minde therin, and in likewise thou thinkest as I take it, that those recoueries cannot bee brought into a custome, but that the longer that they be suffered to continue if they be not good by the Law, the greater is the offence against God. And therefore thou pondrest little that custome, but yet thou agreest that it is good to spare the multitude of them that be past, least a subuersion of the inheritance of many of this realme might follow, and great strife and variance also, if they should be annulled for the time past, except there be any other speciall cause to auoid them by the Law, as thou hast touched in the last reason: but thou thinkest that it were good, that from hence forth such recoueries should bee clerely prohibited, and not bee suffered to be had in vse, as they haue been before, and thou counsellest all men therefore to refrain themselues from such recoueries hereafter. Do. Thou takest well that I haue said, and according as I haue meant it. S. Now I pray thee, sith I haue heard thy question of these recoueries, according to thy desire, that thou wouldest aunswere me to some particuler questions concerning Tailed lands, whereof thou hast at this time giuen vs occasion to speake. D. Shew me those questions, & I will shew thee my mind therein with good will.

¶ The first question of the Student, concerning tailed lands.

Cap. 27.

If a disseisor make a gift in the taile to John a Stile, & I. at S. for the redeeming of the title of the disseisee, agreeth with him that he shal haue a certaine rent out of the same land to him & to his heires, & for the surety of the rent it is deuised that the disseisie shall release his right in the land &c. & that such a recouerie as we haue spoke of before, shalbe had against the said I. at St. to the vse of the payment of the said rent and of the former taile: whether standeth that recouerie wel with conscience or not, as thou thinkest? D. I suppose it doth, for it is made for the strength and suretie of the taile, which the disseisie might haue clerely defeated and auoided if he would, & therfore I thinke if the said I. at S. had graunted to the disseisie, onely by his deed a certain rent for the releasing of his title, that graunt should haue bound the heires in the taile for euer. And then if the disseisie for his more suretie will haue such a recouery, as before appeareth, it seemeth that recouerie standeth with good conscience. S. It seemeth that thy opinion is right good in this matter. And also it appeareth that with a reasonable cause, some particular recoueries may stand both with law & conscience to bar a taile.

¶ The second question of the Student, concerning tailed lands.

Cap. 28.

If a tenant in taile suffer a recouerie against him of his lands entailed, to the intent that

the recouerer shall stand seised the rook, to the vse of a certaine woman whom he intendeth to take to his wife, for terme of life, and after to the vse of the first Taile, and after he marrieth the same woman, whether standeth that recouerie with conscience, though other recoueries vpon bargaines and sales did not? Do. It seemeth yes, for though the statute bee that they to whom the tenements be so giuen, should not haue power to alien, but that the Lands after their death should remaine to their issues, or reuert to the donours, if the issues failed: yet if he to whom the Lands were so giuen, take a wife, and dyeth seised without heire of his body, and the donour enter, the woman shall recouer against him the third part to hold in the name of her dowrie, for term of her life, though the taile be determined. And the same law is of tenant by the Curtesie, that is to say, of him that happeneth to marry one that is an inheritrix of the Land entailed, and they haue issue, the wife dyeth, and the issue dyeth, he shal hold the lands for terme of his life, as tenant by the curtesie, notwithstanding the words of the statute, which say that after the death of the tenant in taile without issue, the lands shall reuert to the donor: and I thinke the cause is because the intent of the statute shall not bee taken, that it intended to put away such titles as the Law should giue, by reason of the Taile: and so it seemeth that a like entent of the Statute shalbe taken for Ioyntures, for else the statute might be sometime a letting of Matrimonie, and it is not like that the statute intended

so. And therefore it seemeth, that by the onely deed of the tenant in taile, a Iointure may bee made by the intent of the Statute, though the words of the Statute serue not expresly for it: for many times the intent of the letter shall bee taken, and not the bare letter, as it appeareth in the same Statute, where it is said, that he to whom the lands be giuē shal haue no power to alien: yet the same statute is construed that neither he nor his heires of his bodie shall haue no power to alien: & so mee thinketh that such an intent shall be taken here for sauing of iointures. S. Truth it is, that sometime the intent of a Statute shal be taken farther than the expresse letter stretcheth, but yet there may no intent bee taken against the expresse words of the Statute, for that should bee rather an interpretatiō of the Statute, than an exposition: and it cannot bee reasonably taken, but that the intent of the makers of the said Statute was, that the land should remaine continually in the heires of the taile, as long as the taile endureth: and there can no Iointure bee made neither by deed nor by recouerie, but that the taile must thereby bee discontinued, and therefore this case of iointure is not like to the said cases of Tenant in Dower, or Tenant by the Curtesie: for the title of Dowrie, and of Tenancie by the Curtesie groweth most specially by the continuance of the possession in the heires of the Taile, but it is not so of iointures: and therefore by the onely deed of the tenaunt in the Taile, there may no Iointure bee lawfully made against the expresse words

of the ſtatute. And if there be any made by way of recouerie, then it ſeemeth that it muſt be put vnder the ſame rule, as other recoueries muſt be of lands entailed.

¶ The third queſtion of the Student concerning tailed lands.

Cap. 29.

IF Iohn at Noke being ſeiſed of lands in fée of his méer motiõ make a feoffement of certaine lands to thintent that the feoffées ſhall thereof make a gift to the ſaid Io. at Noke to haue to him and to his heires of his bodie, and they make the gift accoꝛding. And after the ſaid I. at Noke falleth into debt, wherefoꝛe he is taken and put in pꝛiſon, and thereupon foꝛ payment of his debts, hee ſelleth the ſame land, and foꝛ ſuretie of the buyer he ſuffereth a recouery to bee had againſt him in ſuch manner as befoꝛe appeareth, whether ſtandeth ẏ recouery with conſcience oꝛ not? Do. I would here make a little digreſſiõ to aſke thée another queſtion oꝛ that I make anſwere to thine: that is to ſay, to feele thy mind how the Law by the which the bodie of the debtoꝛ ſhal be taken and caſt into pꝛiſon, ther to remain til he haue paid the debt, may ſtand with conſcience, ſpecially if hee haue nothing to pay it with, foꝛ as it ſeemeth if hee will relinquiſh his goods which in ſome laws is called in latine Cedere bonis, that he ſhall not bee impꝛiſoned, and that is to bee vnderſtood moſt ſpecially if hée bee fallen into

po-

pouertie, and not through his owne default. S. There is no law in the realme that the defendant may in any case Cedere bonis, & as me seemeth if there were such a Law, it should not bee indifferent, for as to the knowledge of him that the money is owing to, the debtor might Cedere bonis, ỹ is to say, relinquish his goods, and yet retaine to himselfe secretly great riches. And therefore that Law in such case seemeth more indifferent & righteous that committeth such a debtor to the conscience of the plaintife to whom the money is owing, than the committing him to the conscience of him that is the debtor: for in the debtor some default may be assigned, but in him to whom the mony is owing, may be assigned no default. D. But if he to whom the debt is owing, knoweth that the debtor hath nothing to pay the debt with, and that hee is fallen into pouertie by some casualtie, and not through his owne default, both the law of England hold, that he may with good conscience keepe the debtor still in prison till he be paid. S. Nay verily, but it thinketh more reasonable to appoint the libertie and the iudgement of conscience in that case to the debtee than to the debtor, for the cause before rehearsed. And then the debtour, if hee knew the trueth, is (as thou hast said) bound in conscience to let him goe at libertie though hee bee not compellable thereto by the Law. And therefore admitting it for this time, that the law of Englād in this point is good and iust, I pray thee that thou wilt make answere to my question. Doct. I will with good will, and

of the ſtatute. And if there be any made by way of recouerie, then it ſeemeth that it muſt be put vnder the ſame rule, as other recoueries muſt be of lands entailed.

¶ The third queſtion of the Student concerning tailed lands.

Cap. 29.

IF Iohn at Noke being ſeiſed of lands in fée of his méer motiõ make a feoffement of certaine lands to thintent that the feoffées ſhall thereof make a gift to the ſaid Io. at Noke to haue to him and to his heires of his bodie, and they make the gift according. And after the ſaid I. at Noke falleth into debt, wherefore he is taken and put in priſon, and thereupon for payment of his debts, hee ſelleth the ſame land, and for ſuretie of the buyer he ſuffereth a recouery to bee had againſt him in ſuch manner as before appeareth, whether ſtandeth ỹ recouery with conſcience or not? Do. I would here make a little digreſſiõ to aſke thée another queſtion or that I make anſwere to thine: that is to ſay, to féele thy mind how the Law by the which the bodie of the debtor ſhal be taken and caſt into priſon, ther to remain til he haue paid the debt, may ſtand with conſcience, ſpecially if hee haue nothing to pay it with, for as it ſeemeth if hee will relinquiſh his goods which in ſome lawes is called in latine Cedere bonis, that he ſhall not bee impriſoned, and that is to bee vnderſtood moſt ſpecially if hée bee fallen into po-

pouertie, and not through his owne default. S. There is no law in the realme that the defendant may in any case Cedere bonis, & as me seemeth if there were such a Law, it should not bee indifferent, for as to the knowledge of him that the money is owing to, the debtor might Cedere bonis, ꝑ is to say, relinquish his goods, and yet retaine to himselfe secretly great riches. And therefore that Law in such case seemeth more indifferent & righteous that committeth such a debtor to the conscience of the plaintife to whom the money is owing, than the committing him to the conscience of him that is the debtor: for in the debtor some default may be assigned, but in him to whom the mony is owing, may be assigned no default. D. But if he to whom the debt is owing, knoweth that the debtor hath nothing to pay the debt with, and that hee is fallen into pouertie by some casualtie, and not through his owne default, doth the law of England hold, that he may with good conscience keepe the debtor still in prison till he be paid? S. Nay verily, but it thinketh more reasonable to appoint the libertie and the iudgement of conscience in that case to the debtee than to the debtor, for the cause before rehearsed. And then the debtour, if hee knew the trueth, is (as thou hast said) bound in conscience to let him goe at libertie though hee bee not compellable thereto by the Law. And therefore admitting it for this time, that the law of Englād in this point is good and iust, I pray thee that thou wilt make answere to my question. Doct. I will with good will, and

therfore as me seemeth, forasmuch as it appeareth that the sayd gift was made of the meere libertie and free will of the said John at Noke, and without any recompence: that therefore it cannot be otherwise taken, but that the intent of the said I. at Noke, as well at the time of the said feoffement, as at the time that hee receiued againe the sayd gift in the tayle, was, that if he happened afterwards to fal into pouertie, that he might alien the said Land to relieue him with, for how may it be thought that a man will so much ponder the wealth of his heire, that he will forget himselfe? and so it seemeth that not onely the said recouerie standeth with conscience, but also if he had made only a feoffement of the land, the feoffement should be in conscience a good barre of the taile: but if the said feoffement and gift had bin made in consideration of any recompence of money, or for any matrimony or such other, then the feoffemēt of the said I. at N. should not bind his heire, & if he then suffered any recouery thereof, then ꝯ recouerie should be of like effect as other recoueries whereof we haue treated before, & that which I said it was good to fauour rather for their multitude, thā for the conscience: and the same law is, that if the son and the heire of the said I. at Noke in case that the said gift was made without recompence, alien the land for pouertie after the death of his father, the recouery bindeth not but as other recoueries doe: for it cannot be thought that the intent of the father was, that any of his heires in tail shold for any necessitie disherite all other heires in

taile

taile that should come after him, but for himself mee thinketh it is reasonable to Judge in such maner as I haue said before. Sr. And though the intent of the said John at Noke, when he made the said feoffement, and when he toke againe the said gift in taile, were that if he fel in nèd that he might alien: yet I suppose that he may not alien though percase for the more suretie he declared his intent to be such vpon the liuery of seisin: for that intent was contrary to the gift that he frely toke vpon him, and when any intent or cõdition is declared or reserued against the state that any many maketh or excepteth: then such an intent or condition is void by the law, as by a case that hereafter followeth will appeare, that is to say, If a man make a feoffement in fee, vpon condition that the feoffee shall not alien to any man, that condition is void, for it is incident to euerie state of the fee simple, that he ꝑ is so seised may alien. And like as in a fee simple there is incident a power to alien, so in a state taile there is a secret intent vnderstood in the gift, that no alienation shalbe made. And therefore though ꝑ intent of the said Jo. at N. were, that if he fell into pouertie that he might sell, and though he at the taking of the gift openly declared his intent to be so: yet the intent shold be void by the law as me seemeth, and if it be void by the law, it is also void in cõscience, and so the said recouery must be takẽ in this case to be of the same effect, as recoueries of other lands intailed be, and in no other maner.

The 30. Chapter.

¶ The fourth queſtion of the Student, concerning Recoueries of Enheritances entailed.

Cap. 30.

IF an Annuitie be granted to a man to haue and to perceiue to the grantee, & to the heirs of his body, of the cofers of his grantor: and after the grantee ſuffereth a recouerie againſt him in a writ of Entre, by the name of a rent in Dale of like ſum as the Annuitie is of, with vouchers & iudgement after the cõmon courſe, and both parties intend that the Annuity ſhall be recouered: whether ſhall the recouery bind the heire in taile of his Annuitie? D. What if it were a rent going out of Land, of what effect ſhould the recouerie be then? Stu. It ſhould be then of like effect as if it were of land. Do. And ſo it ſeemeth to be of this Annuitie, for as mee thinketh, a rent, and Annuitie be of one effect, for the one of them ſhal be paid in ready money as the other ſhall. S. Trueth, and yet there be many great diuerſities betwixt them in the law. D. I pray thee ſhew me ſome of thoſe diuerſities. Stu. Part I ſhall ſhew thee, but I wot not whether I can ſhew thee all, but firſt thou ſhalt vnderſtand that one diuerſity is this. Euerie Rent, be it Rent ſeruice, Rent charge, or Rent ſecke, is going out of land, but an Annuitie goeth not out of any Land, but chargeth oneiy the perſon, that is to ſay, the Graunter, or his heires that haue Aſſets by diſcent, or the houſe if it be graunted by a

houſe

house of Religion to perceiue of their cofers. Also of an Annuitie there lyeth no action, but onely a writ of Annuitie against the graun-tour, his heires, or successours, and that writ of Annuitie lyeth neuer against the pernour, but onely against the grantor or his heires: but of a rent, the same action may lye, as doth of land as the case requireth, and it lyeth sometime of rent against the pernour of the rent, that is to say, against him that taketh the rent wrongfully, & sometime against neither. As of a rent seruice, Assise may lye for the Lord against the Meine, & the Disseisor, or sometime against ye Meine only, if he did also the disseisin. Also an Annuitie is neuer taken for an assets, because it is no freehold in the Law, ne it shall not be put in execution vpon a statut Merchant, statut Staple, ne Elegit, as a rent may. And because the said writ of Entre lay not in this case of this annuitie, & that it cannot be intended in the law to be the same Annuitie, though it be of like sum with the Annuitie, ne though the parties assented & meant to haue the same annuitie recouered by the said writ of Entre, therefore the said recouerie is void in law and conscience. But if such a recouerie be had of rent with a voucher ouer, then it shall be taken to be of like effect, as recoueries of lands be in such maner as we haue treated of before.

¶ The fift question of the Student concerning tayled Lands.

Capi

The 31. Chapter.

Cap. 31.

IF lands be giuen to a man and to his wife in the name of her Ioincture, by the father of the husband, to haue & to hold to them and to the heires of their two bodies begotten, & after they haue issue & the husband dyeth, and the wife alieneth the land, & against the statute of 11. H. 7. suffreth a recouery thereof to be had against her, to the vse of the buyer, & after her son & heire apparant that is heire to the taile releaseth to the recoueres by fine, & dyeth, hauing a brother aliue, and after the mother dyeth: who hath right to the lād, the buyer, or the brother of him that released? D. What is thine opinion therein, I pray thee shew me. S. Me seemeth that the buyer hath right, for by ꝑ sayd statut made in the 11. yere of H. 7. among other things it is enacted, that if any woman which hath lands of the gift of her husband, or of the gift of any of the Auncestors of the husband suffer any recouery thereof against her, by couin, that then such recouery shalbe voyd, & that it shall be lawfull to him that should haue the Land after the death of the woman to enter, & it to hold as in his first right: prouided alway that that statute shal not extend where he that should haue the land after the death of the woman is agreable to any such alienation or recouerie, so that the agreement be of record. And forasmuch as the heire in this case agreed to ꝑ said recouery & fine, which is one of the highest Records in the law, it seemeth that the buyer hath right against that heire that agreed, and

against

against all that shall bee heire of the taile, and that not onely by the sayd recouerie, but also by the said Statute, whereby the said recouerie with assent of the heir is affirmed. D. Though the buyer in this case haue right during the life of the heire that released, yet neuertheless, after his death his heir as it seemeth may lawfully enter: for the agreement whereof the statute speaketh, must as I suppose either be had before the recouerie, or els at the time of the recouerie: For if a title by reason of the sayd statute be once deuolute to the heir in the taile, then the right as me seemeth cannot be extinct nor put away by the onely fine of the heire, no more than if he had died, and the next heire to him had released to the buyer by fine, in which case the release could not extinct the right of the title, nor the right of Entre that is giuen by the Statute: and so as mée seemeth, his next heire may therefore enter. S. As I perceiue all thy doubt is in this case, because the assent of the heire was after the recouerie: for if it had been at the time of the recouerie, as if the heire had bin vouched to warrant in the same recouerie, and he had entred, and thereupon the iudgement had béene giuen, thou agreest well, that the recouerie should haue auoided the taile for euer.

Doctor. That is true, for it is in expresse words of the Statute, but when the assent is after the recouerie, then me thinketh it is not so, ne that the right of the first taile, which was receiued by the sayd Statute, shall not be extinct by his fine, no more than it shall in other

other taile. S. I will be aduised vpon thy opinion in this matter, but yet one thing would I moue further vpon this Statute, and that is this: Some say, that by this statute all other recoueries that haue bin had ouer beside these recoueries of Iointures be affirmed: for they say, that sith the Parliament at the making of this statute, knew well that many other recoueries were then vsed and had, to defeate Tayles, that it was like that they would so continue, which neuertheiesse the Parliament did not prohibit for the time to come, as it did the said Recoueries of Iointures: that it is therefore to suppose, that they thought that they should stand with Law and conscience: but because Iointures were made rather for the sauing of the inheritance of the husband than to destroy the inheritance, they say that the Parliament thought and adiudged the alienations and recoueries of such Iointures to be against the law & conscience, and not the Alienations of other lands entailed: for if they had, they say that the Parliament would haue auoided recoueries of tailed lands generally, as well as it did of Recoueries of Iointures.

Do. As to that opinion I will answere thee thus for this time, that though that the makers of the said estatute onely put away recoueries of Iointures, and not other recoueries, that yet it cannot be taken therefore that their intent was that the other Recoueries should stand good and perfect: for they spake thē only of Iointures, because there was no complaint made in the Parliament at that time, but against

againſt recoueries had of Iointures, and therfore it ſeemeth that they intended nothing concerning other recoueries, but that they ſhould be of the ſame effect as they were before, and no otherwiſe. And that will appeare more plainly thus: though the makers of the ſayd ſtatute intended to put away & adnull ſuch recoueries as ſhould bee made of iointures after a certaine day limited in the Statute, that yet they intended not to auoid ne affirme ſuch recoueries of Iointures as were paſſed before that time: and if they intended not to auoid ne affirme the recoueries had of iointures before that time, then how can it bee taken, that they intended to put away, or affirme other recoueries that were paſſed before that time, & not of Iointures, that would not affirme, ne put away recoueries paſſed of iointures before that time? And ſo, as it ſeemeth, they intended to ſpare the multitude of them that were paſſed of both, and not to comfort any to take them after that time. Stu. I am content thy opinion ſtand for this time, and I will aſke thee another queſtion.

¶ The ſixt queſtion of the Student concerning tailed lands.

Cap. 32.

IF tenant in taile be diſſeiſed, & die, & an auncеſtor collaterall to the heire in taile releaſe by a warranty, and dye, & the warrantie diſcendeth vpon the heire in the taile: whether is he there-

therby barred in cõscience, as he is in the law?
D. Because your principall intent at this time is to speake of recoueries, & not of warranties, & also because it hath bin of long time taken for a principall Maxime of the law, ỹ it should bee a barre to the heires aswell that claime by a fee simple, as by state taile, and for that also that it was not put away by the said Statute of W.2. which ordained the taile, I will not at this time make thee an answere therein, but will take a respite to be aduised. Stu. Then I pray thee yet or we depart, shew me what was the most principall cause that moued thee to mone this question of recouries had of tailed Lands.
D. This moued me thereto: I haue perceiued many times that there bee many diuers opinions of these Recoueries, whether they stand with conscience or not, & that it is to doubt that many persons run into offence of Conscience thereby. And therefore I thought to serle thy mind in them, whether I could perceiue that it were cleere, that they serued to breake the taile in law and conscience, or that it were clerly against conscience so to breake the taile, or that it were a matter in doubt: & if it appeared a matter in doubt, or that it appeared that the matter were vsed clerly against conscience, then I thought to doe somewhat to make the matter appeare as it is, to the intent that they that haue the rule & charge ouer the people aswell the spirituall men as temporall men, should the rather endeuour them to see it reformed for the commonwealth of the people, aswell in bodie as in soule. For when any thing is vsed to the dis-

displeasure of God, it hurteth not onely the body, but also the soule. And temporal rulers haue not onely cure of the bodies, but also of the soules, & shall answere for them if they perish in their default. And because it seemeth by more apparent reason that the tailes be not broken, ne fully auoided by the said recoueries, & that yet neuertheleſſe the great multitude of them that bee passed is right much to bee pondered: Therefore it were verie good to prohibite them for time to come, to put away such ambiguities and doubts as arise now by occasion of the said recoueries, and so they be put as snares to deceiue the people, and so will they bee as long as they be suffered to cõtinue. And me thinketh verily that it were therefore right expedient, that tayled lands should from henceforth either be made so strong in the law, that the taile should not bee broken by recouerie, fine with proclamation, collaterall warranty, nor otherwise: or else that all tayles should be made fee simple, so that euerie man that list to sell his land, may sell it by his bare feoffement, & without any scruple or grudge of conscience: & then there should not be so great expẽces in the law, nor so great variance among the people, ne yet so great offence of conscience as there is now in many persons. S. Verily mee thinketh that thy opinion is right good, & charitable in this behalfe: and that the rulers bee bound in conscience to take vpon it, to see it reformed and brought into good order. And verily by that thou hast said therin, thou hast brought me into remembrance, that there be diuers like snares con-

concerning ſpirituall matters ſuffered among ȳ people, wherby I doubt that many ſpirituall rulers be in great offence againſt god. As it is of the point that ſpirituall men haue ſpoken ſo much of, that prieſts ſhould not be put to anſwere before lay men, ſpecially of felonies and murders: & of the ſtatut of 45. E. 3. cap. 3. where it is ſaid, that a Prohibition ſhall lye where a man is ſued in the ſpirituall Court for tithe of wood, ȳ is aboue the age of xx. yeres, by ȳ name of Silua Cedua as it hath done before: and they haue in open ſermõs, & in diuers other opẽ cõmunications & counſels cauſed it to bee openly notified & known, that they ſhould be all accurſed that put prieſts to anſwere, or that maintain ȳ ſaid eſtatute, or any other like to it. And after when they haue right wel perceiued, that notwithſtanding all ȳ they haue done therein, it hath bin vſed in the ſame points through all the realme, in like maner as it was before: thẽ they haue ſat ſtil & let ȳ matter paſſe, & ſo when they haue brought many perſons in great dãger, but moſt ſpecially them that haue giuen credence to their ſaying, & yet by reaſon of ȳ old cuſtome haue done as they did before, thẽ there they left them: but verily it is to feare that there is to themſelues right great offẽce thereby, that is to ſay, to ſee ſo many in ſo great danger as they ſay they bee, and to doe no more to bring them out of it, than they haue done for it: if it bee true as they ſay, they ought to ſticke to it with effect in all charitie, till it were reformed: and if it be not as they ſay, then they haue cauſed many to offend that haue giuen credẽce

to

to them, and yet contrarie to their owne conscience do as they did before, & that percase should not haue offended if such sayings had not bẽn. And so it seemeth that they haue in these matters done either too much, or too little.

And I beseech Almightie God, that some good man may so call vpon all these matters, that wee haue now communed of, so that they that bee in authoritie may somewhat ponder them, and to order them in such manner that offence of conscience grow not so lightly thereby hereafter, as it hath done in times past. And verily he that on the Crosse knewe the price of mans soule, will hereafter aske a right strait accompt of rulers for euerie soule that is vnder them, and that shall perish through their default.

Thus haue I shewed vnto thée in this little Dialogue, how the Law of England is grounded vpon the Law of reason, the law of God, the generall Customes of the Realme, & vpon certaine principles that be called Maximes, vpon the particuler Customes vsed in diuers Cities and countries, and vpon statutes which haue bẽne made in diuers Parliamẽts by our Soueraigne Lord the King and his progenitors, and by the Lords Spirituall and Temporall, and all the Commons of the Realme. And I haue also shewed thee in the 9. Chapter of this Booke, vnder what manner the said generall Customes and Maximes of the law may be proued & affirmed if they were denied, & diuers other things bee contayned in this present Dialogue, which will appeare in

the table that is in the later end of the Booke, as to ye Readers will appeare. And in the end of the said dialogue, I haue at thy desire shewed thee my conceit concerning Recoueries of tailed lands, and thou hast vpon the said recoueries shewed mee thine opinion. And I beseech our Lord set them shortly in a good clere way: for surely it will be right expedient for the well ordering of conscience in many persons, that they be so. And thus the

God of peace and loue
be alway with vs
Amen.

HEere endeth the first Dialogue in Englisſh, with new additions, betwixt a Doctor of Diuinitie, and a Student in the Lawes of England. And hereafter followeth the ſecond.

In the beginning of which Dialogue the Doctor aunſwereth to certaine queſtions, which the Student made to the Doctor before the making of his Dialogue, concerning the Lawes of England and conſcience, as appeareth in a Dialogue made betweene them in Latine the 24. ch. And he aunſwereth alſo to diuers other queſtions, that the Student maketh to him in this Dialogue, of the Law of England and conſciẽce. And in diuers other Chapters of this preſent Dialogue is touched ſhortly, how the Lawes of England are to bee obſerued and kept in this Realme, as to temporall things, aſwell in Law as in conſcience, before any other Lawes. And in ſome of the Chapters thereof, is alſo touched that ſpirituall Iudges in diuers caſes bee bound to giue their Iudgemẽts according to the Kings Law. And in the later end of the booke the Doctor moueth diuers caſes concerniug rhe Lawes of England wherein he doubteth how they may ſtand with conſcience, whereunto the Student maketh aunſwere in ſuch maner as to the Reader will appeare.

IN the latter end of our first Dialogue in Latin, I put diuers cases grounded vpon the Lawes of England, wherein I doubted, and yet doe, what is to bee holden therein in conscience. But forasmuch as the time was then farre past, I shewed thee that I would not desire thee to make aunswere to them forthwith at that time, but at some better leasure, whereunto thou saist thou wouldest not onely shew thine opinion in these cases, but also in such other cases as I would put: wherefore I pray thee now (forasmuch as mee thinketh thou hast good leasure) that thou wilt shew me thine opinion therein. Do. I will with good will accomplish thy desire: but I would that when I am in doubt what ꝯ law of this realm is in such cases as thou shalt put, that thou wilt shew me what ꝯ law is therin: for though I haue by occasiõ of our first Dialogue in Latine learned many things of the lawes of this realm which I knew not before, yet neuertheless there bee many mo things that I am yet ignorãt in, and that paraduenture in these selfe cases that thou hast put & intẽdest hereafter to put: & as I said in the first Dialogue in Latin the 20 Cha. to search conscience vpon any case of the law it is in vaine, but where the law in the same case is perfectly knowne. Stu I will with good will doe as thou saiest, & I intend to put diuers of the same questions, that be in the last Cha. of the said Dialogue in Latin, & sometime I intend to alter some of them, and adde some new questions to them, as I shall be most

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in doubt of. D. I pray thee do as thou saist, and I shall with good will either make answer to them forthwith as well as I can, or shall take longer respit to be aduised, or else paraunture agree to thine opinion therein, as I shall see cause. But first I would gladly know the cause why thou hast begun this Dialogue in the English tongue, & not in the Latin tongue, as the first cases ỳ thou desirest to know mine opinion in, be, or in French as the substance of the law is. S. The cause is this. It is right necessarie to all men in this realme, both spirituall & temporal for the good ordering of their cõscience, to know many things of the Law of England ỳ they be ignorant in. And though it had bin more pleasant to thẽ that be learned in the Latin tongue, to haue had it in latin rather than in English: yet neuertheless forasmuch as many can read English ỳ vnderstand no Latin, & some ỳ cãnot read English, by hearing it read may learne diuers things by it, that they should not haue learned if it were in Latin: Therfore for the profit of the multitude it is put into the English tongue rather than into the latin or frẽchtongue. For if it had bin in French, few should haue vnderstood it, but they that be learned in the law, and they haue least need of it, forasmuch as they know the law in the same cases without it, & can better declare what conscience will thereupon, than they that know not the law nothing at all. To them therefore that be not learned in the Law of the realm this treatise is specially made: for thou knowest well by such studies thou hast

taken to some knowledge of the Law of the realme, that is to them most expedient. D. It is true that thou saiest, and therefore I pray thee now proceed to thy questions.

¶ The first question of the Student.

Cap. 1.

IF tenant in taile after possibility of issue extinct, do waste, whether doth he thereby offend in conscience though he be not punishable of waste by the law? D. Is the law cleare that he is not punishable for the waste? S. Ye verely. D. And what is the law of tenants for terme of life, or for terme of yeares if they do waste? S. They be punishable of waste, by the statutes, and shall yeld treble damages: but at the common law before the statute they were not punishable. D. But whether thinkest thou that before the statute they might haue done waste with conscience, because they were not punishable by the Law. S. I thinke not, for as I take it, the doing of waste of such particuler tenant for terme of life, for terme of yeares, or of tenants in Dower, or by the curtesie, is prohibited by the Law of reason, for it seemeth of reason that when such Leases be made, or that such titles in Dower, or by the curtesie be given by the Law, that there is onely giuen vnto them the annuell profits of the land, and not the houses and trees, and the grauell to digge and carrie away, whereby the whole profit of them in the reuersion should bee taken away

for

for euer. And therefore at the common law for waſt done by tenant in dower, or tenant by the curteſie, there was puniſhment ordained by the Law, by a prohibition of waſt, whereby they ſhould haue yelded damages to the value of the waſt. But againſt tenant for terme of life or for terme of yeares, lay no ſuch prohibition, for there was no Maxime in the law therein, againſt them, as there was againſt the other. And I thinke the cauſe was, forasmuch as it was iudged a folly in the leſſor that made ſuch a leaſe for terme of life, or for terme of yeres, that at the time of the leaſe he did not prohibit them they ſhould not doe waſt, and ſith he did not prouide no remedie for himſelfe, the Law would none prouide. But yet I think not that the intent of ȳ law was, that they might lawfully and with good conſcience doe waſt, but againſt Tenants in dower, and by the curteſie the law prouided remedy, for they had their title by the Law.

And verily me thinketh that this tenant in taile as to doing of waſt, ſhould be like to a tenant for terme of life: for he ſhall haue the land no longer than for term of his life, no more thā a tenant for terme of life ſhall, and the waſt of this tenant is as great hurt to him in the reuerſion or the remainder, as is the waſt of a tenant for terme of life, and if he alien, the donor ſhall enter for the forfeiture, as he ſhall vpon ȳ alienation of a tenant for terme of life, and if he make default in a Præcipe quod reddat, the Donor ſhall be receiued as he ſhall be vpon the default of a tenant for terme of life:

and therefore me thinketh he shall also bee punishable of wast, as tenant for term of life shall. St. If he alien, the donor shal enter as thou saist because the alienation is to his disheritance, & therfore it is a forfeiture of his estate: and that is by an auntient Maxime of the law that giueth that forfeiture in the selfe case, and if he make default in a Præcipe qd' reddat, he in the reuersiõ, as thou saist, shalbe receiued, but that is by the statute of West. 2. for at the Common law there was no such reseet: & as for the statute that giueth the action of Wast against a tenant for terme of life, and for terme of yeres, it is a statute penall, and shal not be taken by equity: and so there is no remedy giuen against him, neither by common law nor by statute, as there is against tenant for terme of life, & therfore he is vnpunishable of wast by the law. D. And though he be vnpunishable of wast by the law, yet neuertheless me thinketh he may not by conscience doe that, that shall be hurtfull to the inheritance after his time, sith he hath the Land but for terme his life, no more than a tenant for terme of life may, for then he should doe as he would not be done vnto. For thou agreest thy selfe, that though a tenant for terme of life was not punishable of Wast before the Statute, that yet the Law iudged not that he might right fully and with good conscience doe wast. And therefore at this day if a feoffement be made to the vse of a man for terme of life, though there ye no actiõ against him for wast, yet he offendeth in conscience if he doe wast, as Tenant for terme of life did afore the Statute

tute, when no remedie lay against him by the law. St. That is true, but there is great diuersitie betweene this tenant and a tenant for term of life: for this tenant hath good authoritie by the donour to doe waste, and so hath not the tenant for terme of life, as it is sayd before: for the estate of a tenant in taile after possibilitie of issue extinct, is in this maner, when lands be giuen to a man and to his wife, & to the heires of their two bodies begotten, and after the one of them dieth without heires of their bodies begotten, then he or she that ouerliueth, is called tenant in taile after possibilitie of issue extinct, because there can neuer by no possibilitie be any heire that may inherite by force of the gift. And thus it appeareth that the Donées at the time of the gift, receiued of the donor estate of inheritance, which by possibility might haue continued for euer, whereby they had power to cut downe trées, and to doe all thing that is waste, as tenant in fée simple might. And that authoritie was as strong in the law, as if the lessour that maketh a lease for terme of life, say by expresse words in the lease, that the Lessee shall not be punishable of waste. And therefore if the Donour in this case had graunted to the Donée that they should not be punishable of waste, that grant had been void, because it was included in the gift before, as it should be vpon a gift in fée simple: and so forasmuch as by the first gift, and by the Liuerie of seisin made vpon the same, the Donées had authoritie by the donour to do waste; therefore though that one of those Donées be now dead without issue, so

that

that it is certaine, that after the death of the o-ther, the land shall reuert to the donor: yet the authority that they had by the Donour to doe waste, continueth as long as the gift, and the liuery of seisin made vpon the same cõtinueth. And I take this to be the reason why hee shall not haue in aid as tenant for terme of life shall, that is to say, for that he cannot aske helpe of that Maxime, whereby it is ordained, that a tenant for terme of life shall haue in ayd: for he cannot say, but that he tooke a greater estate by ꝯ liuery of seisin that was made to him, which yet continueth, than for terme of life: and so I thinke him not bound to make any restitution to him in the reuersion in this case, for the waste. Do. Is thy mind only to proue that this tenant is not bound to make restitution to him in the reuersiõ for the waste: or that thou thinkest that he may with clere conscience doe all maner of waste? S. I intend to proue no more but that he is not bound to restitution to him in the reuersion. D. Then I will right well agree to thine opinion for the reason that thou hast made: but if thy mind had bin to haue proued that he might with clere conscience haue done all maner of waste, I would haue thought the cõtrarie thereto, & that the tenãt in fee simple may not do al maner of waste and destruction with conscience, as to pull downe houses & make pastures of cities and townes, or to doe such other acts which be against the common wealth. And therfore some will say, that tenant in fee simple may not with conscience destroy his woods & coale pits whereby a whole countrey

trey for their mony haue had fuel, & yet though he do so, he is not bound by conscience to make restitutiō to no person in certain. But now I pray thee ere thou procēd to the second case, that thou wilt somewhat shew me what thou meanest when thou saiest, at the common law it was thus or thus: I vnderstand not fully what thou meanest by that terme, at the common Law. s. I shall with good will shew thee what I meane thereby.

¶ What is meant by this terme when it is sayd, thus it was at the Common Law.

Cap. 2.

The common law is taken three maner of waies. First it is taken as ꝑ law of this realm of England diſſeuered frō al other Lawes. And vnder this manner taken, it is oftentimes argued in the lawes of England, what matters ought of right to be determined by the common Law, and what by the Admirals court, or by the Spirituall Court: And also if an Obligation beare date out of the realme, as in Spaine, Fraunce, or such other, it is said in the Law & trueth it is, that they be not pleadable at the cōmon law. Secondly the common law is taken as the kings courts of his Bench, or of the Common Place, and it is so taken when a plee is remoued out of ancient demeſne for that the land is franke fee & pleadable at the cōmon Law, that is to say, in the Kings court, and not in Ancient demeſne.

And

And vnder this maner taken, it is oftentimes pleaded also in base Courts, as in courts Barons, the county, and the court of Pipouders, and such other, this matter or that &c. ought not to be determined in that Court, but at the Common Law, that is to say, in the Kings Courts &c. Thirdly, by the Common law is vnderstood such things as were law before any stat. made in that point that is in question, so that that point was holden for Law by the generall or particuler customes and Maxims of the Realme, or by the law of reason and the law of god, no other law added to them by statut, nor otherwise, as is the case before rehearsed in the first chapter, where it is said: that at the Common Law tenant by the curtesie and tenãt in Dower were punishable of wast, that is to say, that before any statute of wast made, they were punishable of wast by the grounds & Maximes of the law, vsed before the statute made in that point. But Tenant for terme of life, ne for terme of yeres, were not punishable by the said grounds and Maximes, till by the Statute remedy was giuen against them, and therefore it is said, that at the Common Law they were not punishable of wast. Do. I pray thee now proceed vnto the second question.

¶ The second question of the Student.

Cap. 3.

IF a mã be outlawed & neuer had knowledge of the suit, whether may the king take all his goods,

goods, & retaine them in conscience as he may by the law. D. What is the reason why they bee forfeited by the law in that case? Stu. The verie reason, for that it is an old custome and an old Maxime in the law, that hee that is Outlawed shall forfeit his goods to the King, and the cause why that Maxime began, was this: When a man had done a trespasse to another, or another offence wherefore processe of vtlegary lay, and hee that the offence was done to, had taken an action against him according to the Law, if hee had absented himselfe and had no lands, there had beene no remedie against him: for after the law of England no man shall bee condemned without aunswere, or that hee appeare and will not aunswere, except it bee by reason of any Statute. Therefore for the punishment of such offendors as will not appear to make aunswere and to bee iustified in the Kings Court, it hath beene vsed without time of mind, that an attachment in that case should bee directed against him retournable in the Kings Bench or the Common place: and if it were returned thereupon that he had nought whereby hee might bee attached, that then should goe forth a Capias to take his person, and after an Alias Capias, & then a Pluries: and if it were returned vpon euerie of the said Capias that hee could not bee found and hee appeared not, then should an Exigent be directed against him, which should haue so long a day of retourne, that fiue Counties might bee holden before the retourne thereof, and in euerie of the said fiue Counties, the defendant to bee so-

ſolemnly called, and if hee appeareth not, then for his contumacie and diſobediēce of the law, the Coroners to giue Iudgement that he ſhall bee Outlawed, whereby hee ſhall forfeit his goods to the king, and leeſe diuers other aduā-tages in the Law that needeth not here to bee remembred now. And ſo becauſe hee was in this caſe called according to the Law and appeared not, it ſeemeth that the King hath good title to the goods both in law and conſcience.

D. If hee had knowledge of the ſuit in very deed, it ſeemeth the King hath good title in conſcience as thou ſaieſt. But if hee had no knowledge thereof, it ſeemeth not ſo, for the default that is adiudged in him (as appeareth by thine owne reaſon) is his contumacie and diſobedience of the law, and if hee were ignorant of the ſuit, then can there bee alligned to him no diſobedience: for a diſobedience implyeth a knowledge of that he ſhould haue obeied vnto.

Stu. It ſeemeth in this caſe that hee ſhould be compelled to take knowledge of the ſuit at his perill: for ſith hee hath attempted to offend the Law, it ſeemeth reaſon that he ſhalbe compelled to take heed what the Law will doe againſt him for it, and not only that, but that he ſhould rather offer amends for his Treſpaſſe than to tarie till he were ſued for it.

And ſo it ſeemeth the ignorance of the ſuite is of his owne default, ſpecially ſith in the law is ſet ſuch order that euery man may know if he will, what ſuite is taken againſt him, and may ſee the Records thereof when hee will: and ſo it ſeemeth that neither the partie nor

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the law bee not bounden to giue him no knowledge therein. And ouer this I would somewhat moue further in this matter thus. That though that action were vntrue, and the defendant not guiltie, that yet the goods be forfeited to the King, for his not apparance, in law, and also in conscience, and that for this cause: the king as Soueraigne and head of the Law, is bounden of Iustice, to graunt such writs, and such processes as be appointed in the law, to euery person that will complaine, be his surmise true or false, and thereupon the King (of Iustice) oweth aswell to make Processe, to bring the defendant to answere, when he is not guiltie, as when he is guiltie: and then when there is a Maxime in the Law, that if a man be outlawed in such maner as before appeareth, that hee shall forfeit all his good to the King, and maketh no exception whether the Action bee true or vntrue, It seemeth that the said Maxime more regardeth the generall ministration of iustice, than the particuler right of the partie: and therefore the propertie by the Outlary, and by the said Maxime ordained for ministration of iustice, is altered and is giuē to the king, as before appeareth, and that both in law and in conscience, aswell as if the action were true. And then the partie that is so outlawed is driuē to sue for his remedy, against him that hath so caused him to be outlawed vpon an vntrue action.

D. If he haue not sufficient to make recompence, or die before recouerie can be had, what remedie is had then? St. I thinke no remedie: and

and for a further declaratiõ in this case and in such other like cases, where the propertie of goods may be altered without consent of ꝯ owner, it is to consider that the propertie of goods is not giuen to the owners directly by the law of reason, nor by the law of God, but by ꝯ law of man, and is suffered by the Law of reason & by the law of God so to bee. For at the beginning all goods were in common, but after they were brought by the law of man into a certain propertie, so that euerie man might know his owne: and then when such propertie is giuẽ by the law of man, the same law may assigne such conditions vpon the propertie as it listeth, so they be not against the law of God, ne the law of reason, and may lawfully take away that it giueth, and appoint how long the propertie shall continue. And one condition that goeth with euerie propertee in this Realme is, if hee that hath the propertie be outlawed according to such processe as is ordained by the law, that he shal forfeit the propertie vnto the king. And diuers other cases there be also, whereby propertie in goods shall bee altered in the law, and the right in Lands also without assent of the owner, whereof I shall shortly touch some without saying any authoritie therein, for the more shortnesse. First by a sale in open market the propertie is altered. Also goods stollen and seised for the king, or wetued, be forfeit, vnlesse appeale or inditement bee sued Also straies, if they bee proclaimed, and bee not after claimed by the owner within the yeare, be forfeit, & also a Deodand is forfeit to whom soeuer the pro-

per-

perty was before (except it belonged to ye king) & shall be disposed for the soule of him that was slaine therewith: & a fine with a Nonclaime at the Common law, was a barre, if claime were not made within a yere, as it is now by statut if the claime be not made within 5. yeares. And all these forfeitures were ordained by the law vpon certaine considerations which I omit at this time, but certaine it is that none of them were made vpon a better consideration than this forfeiture of Utlagary was. For if no especial punishment should haue bin ordeined for offendors that would absent themselues & not appeare when they were sued in the Kings courts, many suits in the Kings courts should haue bin of small effect. And sith this Maxime was ordeined for the execution of Justice, & as much done therein by the common law, as policie of man could reasonably deuise, to make the party haue knowledge of the suit, and now is added thereto by the statute made the 6. yeare of H. 8. that a writ of Proclamation shall bee sued if the partie be dwelling in another shire: it seemeth that such Title as is giuen to the King thereby is good in conscience, especially seeing that the King is bound to make proces vpon the surmise of the plaintife, and may not examine but by plee of the partie, whether the surmise bee true or nor. But if the partie bee returned fiue times called, where indeede hee was neuer called (as in the second case of the last Chapter of the said Dialogue in latine is contained) then it seemeth the partie shall haue good remedie by petition to the King, spe-

cially if he that made the returne be not sufficient to make recompence, or by before recouery can be had. Do. Now sith I haue heard thine opinion in this case, whereby it appeareth that many things must be seene, or a full and a plain declaration can be made in this behalfe, and seing also that the plaine answere to this case, shall giue a great light to diuers other cases that may come by such forfeiture: I pray thee giue me a farther respite, ere that I shew thee my full opinion therein, and hereafter I shall right gladly doe it. And therefore I pray thee proceed now to some other case.

¶ The third question of the Student.

Cap. 4.

IF a stranger do waste in lands that another holdeth for terme of life without assēt of the tenant for terme of life, whether may he in ꝯ reuersiō recouer treble damages, and the place wasted against the tenant for terme of life according to the statute, in conscience, as hee may by the law, if the straunger be not sufficient to make recompence for the waste done? D. Is the law cleere in this case, that he in the reuersion shall recouer against the tenaunt for terme of life, though that he assented not to the doing of waste? St. Yea verily, and yet if the tenaunt for terme of life had beene bounden in an Obligation in a certaine sum of money that he should doe no waste, hee should not forfeit his bond by waste of a straunger, and the diuersitie is this.

It

It hath beene vsed as an antient Maxime in the law, that tenant by the curtesie & tenant in dower should take the Land with this charge, that is to say, that they should doe no wast thē-selues, nor suffer none to be done: and when an action of wast was giuen after against a tenāt for terme of life, then was he taken to be in the same case as to the point of wast, as tenant by the Curtesie, & tenant in Dower was, that is to say, that hee should doe no Wast, nor suffer none to be done (for there is another Maxime in the Law of Englād, that al cases like vnto other cases shall be iudged after ỹ same law as other cases be) & sith no reason of diuersity can be assigned why the tenant for terme of life after an action of Wast was giuen against him, should haue any more fauour in the law thā the tenant by the Curtesie, or tenaunt in Dower should: therfore he is put vnder the same Maxime as they be, that is to say, that he shal do no wast, ne suffer none to bee done: & so it seemeth that the law in this case doth not consider the abilitie of the person that doth the Wast, whether he be able to make recompēce for the wast or not, but the assent of the said tenants whereby they haue wilfully taken vpō thē the charge to see that no wast shal be done. D. I haue heard that if houses of these tenaunts bee destroyed with sodaine tempest, or with strange enemies ỹ they shall not be charged with wast S. Truth it is. Do. And I thinke the reason is because they can haue no recouery ouer. St. I take not that for the reason, but that it is an old reasonable Maxime in the Law, that they should

be discharged in these cases, howbeit some will say, that in these cases the law of Reason doth discharge them: & therefore they say, ỹ if a statute were made, that they should bee charged in these cases of wast, that ỹ statute were against reason, & not to be obserued: but yet neuertheless I take it not so, for they might refuse to take such estate if they would, & if they wil take the estate after the law made, it seemeth reasonable that they take it with the charge & with the condition that is appointed thereto by the Law, though hurt might follow to them afterward thereby: for it is oftentimes seene in the law, that the law doth suffer him to haue hurt without help of the law, that will wilfully run into it of his owne act not cõpelled therto, & adiudgeth it his folly so to run into it, for which folly he shal also be many times without remedy in cõscience. As if a man take land for term of life, and bindeth himselfe by obligation that he shal leaue ỹ land in as good case as he found it, if the houses bee after blowne downe with tempest or destroyed with strange enemies, as in the case that thou hast put before, he shall be bound to repaire them, or els he shal forfeit his Obligation in law & conscience: because it is his owne act to bind him to it, and yet the law would not haue bound him therto, as thou hast said before. So mee thinketh, ỹ the cause why the said tenants be discharged in the law in an action of wast, when the houses be destroied by sodaine tempest, or by strange enemies, is by a speciall reasonable Maxime in the law wherby they be excepted from the other generall bond

before

before rehersed, that is to say, they shall at their perill se that no wast shalbe done, & not by the law of reason: & sith there is no maxime in this case to helpe this tenant, ne that he cannot be holpen by the law of reason, it semeth that he shalbe charged in this case by his owen act both in law & conscience, whether the stranger be able to recõpence him or not. D. I doubt in this case whether the maxime that thou speakest of be reasonable or not, that is to say, that tenãts by the curtesie, & tenants in dower, were bound by the cõmon law, that they should do no wast themselues, and ouer that at their perill to se that no wast shold be done by none other. For that law semeth not reasonable that bindeth a man to an impossibility. And it is impossible to preuent, that no wast shalbe done by strãgers: for it may be sodenly done in the night, that the Tenants can haue no notice of, or by great power that they be not able to resist: and therefore me thinketh they ought not to be charged in those cases for the wast, without they may haue good remedie ouer, and then percase the said maxime were sufferable, & els me thinketh it is a Maxime against reason. S. As I haue said before no man shal be compelled to take the bond vpon him, but he that wil take the land, & if he will take the land, it is reason he take the charge as the law hath appointed it: and then if any hurt grow to him thereby, it is through his owne act and his owne assent, for he might haue refused the lease if he would. D. Though a man may refuse to take estate for term of life, or for terme of yeres, and a woman may refuse

to take her Dower, yet tenant by the curtesie cannot refuse to take his estate, for immediately after the death of his wife, the possession abideth still in him by the act of the law without entry: & then I put the case that after the death of his wife, he would waine the possession, and after waste were done by a straunger, whether thinkest thou that hee should aunswer to the waste? S. I thinke he should by the law. D. And how standeth that with reason, seeing there is no default in him? S. It was his default, and at his owne perill that he would marry an inheritrix, whereupon such danger might follow. D. I put case that he were within age at the marriage, or that the land discended to his wife after he maried her. S. There thou mouest a farther doubt than the first question is: and though it were as thou sayest, yet thou canst not say, but ꝑ there is as great default in him, as is in him in the reuersion, & that there is as great reason why he should be charged with the waste, as ꝑ he in the reuersion should be disherited and haue no maner remedy, ne yet no profit of the land as the other hath: and though the said maxime may be thought verie straite to the sayd tenants, yet it is for to be fauoured as much as may be reasonably, because it helpeth much the commonwealth: for it hurteth ꝑ commonwealth greatly, when woods and houses be destroyed: and if they should answer for no waste, but for waste done by themselues, there might be wastes done by straūgers by commandement, or assent, in such colourable maner, that they in the reuersion should neuer haue proofe

of

of their assent. Do. I am content thine opinion stand for this time, and I pray thee now proceed to another question.

¶ The 4. question of the Student.

Cap. 5.

IF he that is the verie heire be certified by the ordinarie bastard, & after bring an action as heire against another person: whether may any man knowing the truth, be of counsel with the tenant and plead the said certificat against the demandant by conscience or not? D. Is the Law in this case that all other against whom the demandant hath title shall take advantage of this certificat, aswell as he at whose suit her is certified bastard? S. Pe verily, & that for two causes, whereof the one is this. There is an old Maxime in the law, that a mischiefe shal be rather suffered thā an inconuenience: & then in this case if another writ should afterward be sent to another Bishop in another action, to certifie whether he were bastard or not, paraduenture the Bishop would certifie ꝑ he were mulier, that is to say, lawfully begotten, & then he should recouer as heire, & so he should in one selfe court be taken as mulier and bastard: for auoiding of which contrariositie, the law will suffer no moe writs to go forth in that case, & suffereth also all men to take aduantage of the certificate, rather than to suffer such a contradiction in the court, which in ꝯ law is called an inconuenience, & the other cause is, because this

certificat of the bishop, is the highest triall that is in the Law in this behalfe, but this is not vnderstood, but where bastardie is laid in one that is party to the writ: for if bastardy be laid in one that is a stranger to the writ, as if vnchē pray in aid or such other, then that bastardy shalbe tried by xij. men, by which triall he in whom the bastardy is laid, shall not be concluded, because he is not privy to the triall, & may haue no attaint, but he that is party to the issue may haue attaint, and therefore he shal be concluded & none other but he: & forasmuch as the said maxime was ordeined to eschue an inconuenience (as before appeareth) it seemeth that euery man learned, may with conscience plead the said certificat for auoyding thereof, & giue counsaile therein to the party according vnto the Law, for else the said inconuenience must needs follow. But yet neuertheless I doe not meane thereby, ỹ the party may after when he hath barred the demaundant by the sayd certificat, retain the land in conscience by reason of the said certificat: for though there be no Law to cōpell him to restore it, yet I think wel that hee in conscience is bound to restore it, if hee knew ỹ the demandant is the verie true heire, whereof I haue put diuers cases like in the xviij. Chapter of the first Dialogue in Latine, but my intent is ỹ a man learned in the Law in this case and other like, may with conscięce giue his counsel according to the law, in auoyding of such things as the law thinketh should for a reasonable cause be eschewed. D. Though he that doth not know whether he be bastard

or

or not, may giue his counsaile, & also plead the said certificat: yet I thinke that he that doth knowe himselfe to bee the verie true heire may not plead it, and that is for two causes, whereof the one is this: Euerie man is bound by the lawe of reason to do as he would be done to, but I think that if he that pleadeth that certificate were in like case, he would thinke that no man knowing the certificat to be vntrue, might with conscience plead it against him, wherefore no more may hee plead it against none other: The other cause is this, although the certificat be pleaded, yet is the tenant bounden in conscience to make restitution thereof, as thou hast said thy selfe, and then in case that he would not make restitution, then he that pleadeth the plea, should run thereby in like offence, for he hath holpen to set the other man in such a libertie that hee may chuse whether he will restore the Land or not, and so he should put himselfe to ieopardie of another mans conscience. And it is written Ecclesiast. 3. Qui amat periculum peribit in illo, that is, hee that wilfully will put himselfe in ieopardie to offend, shall perish therein. And therefore it is the surest way to eschew perils, for him that knoweth that he is heire, not to plead it. And as for the inconuenience that thou sayest must needes follow, but the Certificat be pleaded: As to that it may bee aunswered, that it may be pleaded by some other that knoweth not that he is verie heire, & if the case be so far put that there is none other learned there but hee, then me thinketh that he shall rather suffer the said incon-

inconuenience, thā to hurt his owñ conscience: for alway charitie beginneth at himselfe, and so euery man ought to suffer all other offences rather than he himself would offend. And now that thou knowest mine opinion in this case, I pray thee proceed to another question.

¶ The 5. question of the Student.
Cap. 6.

WHether may a man with conscience be of counsel with the plaintife in an actiō at the cōmon law, knowing ỹ the defēdāt hath sufficient matter in conscience wherby he may be discharged by a Subpena in the Chancerie, which he cannot plead at the cōmon law, or not? Do. I pray thee put a case thereof in certain, for else ỹ question is very general. St. I will put the same case that thou puttest in our first Dialogue in Latin, the x. Chapter, that is to say: If a man bound in an Obligation pay the money, and taketh no acquitance, so that by the common law he shal be compelled to pay the money again, for such consideration, as appeareth in the xv. Chap. of the said Dialogue, where it is shewed euidently how the Law in ỹ case is made vpō a good reasonable ground, much necessarie for al the people, howbeit, that a man may sometime through his owne defelt, take hurt therby, wherin I pray thee shew me thine opinion. D. This case seemeth to be like to the case that thou hast next before this, for he that knoweth the paiment to be made doth not as he would be done to, if he gaue counsel that an action should be taken to haue it payed a-

gaine.

gaine. St. If he be ſworne to giue counſell according to the Law, as Seriеants at the law be, it ſeemeth he is bound to giue counſell according to the Law, for elſe he ſhould not performe his oath. Do. In theſe words (according to the Law, is vnderſtood the law of God, and the law of reaſon, aſwell as the law & cuſtoms of the Realme, for as thou haſt ſaid thy ſelfe in our firſt dialogue in latin, that the law of God, and the law of reaſon, be two ſpeciall grounds of the laws of England, wherefore (as me thinketh) he may giue no counſel (ſauing his oath) neither againſt the law of God, nor the law of reaſon. And certaine it is that this article, that is to ſay, that a man ſhal do as he wold be done to, is grounded vpon both the ſayd laws. And firſt that it is grounded vpon the Law of reaſon, it is euident of it ſelfe. And in the 6. Chapter of Saint Luke, it is ſaid, Et prout vultis vt faciant vobis homines, & vos facite illis ſimiliter, that is to ſay, All that other men ſhould do to you, do you to them, & ſo it is grounded vpon the Law of God, wherefore if he ſhould giue counſell againſt the defendant in that caſe, he ſhould do againſt both the ſayd laws. S. If the defendant had no other remedy but the commõ law, I would agree wel it were as thou ſaiſt, but in this caſe he may haue good remedie by a Subpena, and this is the way that ſhall induce him directly to his Subpena, that is to ſay, when it appeareth that the plaintife ſhall recouer by Law. Doct. Though the Defendant may be diſcharged by Subpena, yet the bringing in of his proxies there, wil be to the charge

of

of the defendant, and alſo the profites may dye or they come in. Alſo there is a ground in the law of reaſon, Quod nihil poſſimus contra veritatem, (that is) we may doe nothing againſt the truth, and ſith he knoweth it is trueth that the money is paid, he may doe nothing againſt the trueth, and if he ſhould be of counſell with the plaintife, he muſt ſuppoſe and auerre that it is the verie due debt of the plaintife, and that the defendant withholdeth it from him vnlawfully, which he knoweth himſelfe to be vntrue: wherefore he may not with conſcience in this caſe be of counſell with the plaintife, knowing that the plaintife is paid alreadie, wherefore if thou be contented with this anſwer, I pray thee proceed to ſome other queſtion. St. I will with good will.

¶ The 7. queſtion of the Student.

Cap. 7.

A Man maketh a feoffement to the vſe of him & of his heires, & after the feoffor putteth in his beaſts to manure the ground, & the feoffee taketh thē as damages feſant, & putteth thē in pound, & the feoffor bringeth an action of treſpas againſt him for entring into his ground &c. whether may any man knowing the ſayd vſe, be of counſell with the feoffee to anoyd the action? D. May he by the common law anoyd that action, ſeeing that the feffor ought in conſcience to haue the profites? S. Yes verily, for as to the Common Law the whole intereſt is in the

the feffee, and if the feoffee will breake his conscience, and take the profits, the feoffour hath no remedie by the common Law, but is driuen in that case to sue for his remedie by Subpena for the profits, and to cause him to reseoffe him againe, & that was sometime the most common case where the Subpena was sued, that is to say, before the Statute of R. 3. but sith the statute, the feoffor may lawfully make a feffemẽt. But neuertheleſſe for the profits receiued, the feoffor hath yet no remedie but by Subpena as he had before the said estatute. And so the suppoſell of his action of trelpas is vntrue in euery point, as to the common law.

D. Though the action be vntrue, as to ỹ law yet he that sueth it ought in conscience to haue that hee demandeth by the action, that is to say, dammages for his profits, and as it seemeth no man may with conscience giue counsell, against that hee knoweth conscience would haue done.

St. Though conscience would hee should haue the profits, yet conscience will not that for the attaining thereof the feoffour should make an vntrue surmiſe. Therefore against the vntrue surmiſe euerie man may with conscience giue his counsell, for in that doing hee reſiſteth not the plaintife to haue the profits, but hee withstandeth him that hee should not maintaine an vntrue action for the profits. And it ſufficeth not in the Law, ne yet in conscience as mee seemeth, that a man hath right to that hee sueth for, but that also hee sue by a iuſt meanes, and that hee hath both good right, and also a good and a true conueyance to come to his right: for

if

if a man haue right to lands, as heire to his fa-
ther, and he will bring an action as heire to his
mother that neuer had right, euerie man may
giue counsell against the actiō, though he know
he haue right by another meanes, and so as me
thinketh he may do in dilatories, whereby the
partie may take hurt if it were not pleaded,
though he know the plaintife haue right: as if
the partie or the towne be misnamed, or if the
degrees in writs of Entre be mistakē, but if the
partie should take no hurt by admitting of a di-
latory, there hee that knoweth that the plain-
tife hath right, may not plead that dilatorie
with conscience: As in a Formedon to plead in
Abatement of the writ, because hee hath not
made himselfe heire to him that was last seised,
or in a Writ of right for that the demaundant
had omitted one ꝑtended right, ne such other,
ne he may not assent to the casting of an essoin,
nor protection for him, if hee know that the de-
maundant hath right, ne he may not vouch for
him, except it be that he knoweth that ꝑ tenant
hath a true cause of a voucher, & of lien, & that
he doth it to bring him thereto, and in like wise
he may not pray in aid for him, vnles he know
the prayee haue good cause of voucher & lien o-
uer, or that he know that the prayee hath some-
what to plead that the tenaunt may not plead,
as villeine in the demandant, or such other. D.
Though the plaintife hath brought an action
that is vntrue & not maintenable in the Law,
yet the defendant doeth wrong to the plaintife
in the withholding of the profits aswell before
the action brought as hanging the action, and
that

that wrong as it seemeth the counsailor doeth maintaine, & also sheweth himselfe to fauour ꝑ partie in that wrong when he giueth counsaile against the action. S. If the plaintife doe take that for a fauor & a maintenance of his wrong, he iudgeth farther than the cause is giuen, so that the counsailor doe no more but giue counsaile against the action, for though hee giue him counsaile to withstand the action for the vntruth of it, and that hee should not confesse it & to make thereby a fine to the King without cause, yet it may not stand with reason that hee may giue counsell to the partie to yeeld the profits: and therefore I thinke he may in this case be of counsaile with him at the common Law, and bee against him in the Chauncerie, and in either Court giue his counsaile without any contrariolitie, or hurt of conscience. And vpon this ground it is, that a man may with good conscience be of counsaile with him that hath Land by discent, or by a discontinuance without title, if he that hath the right bring not his action according to the law, for the recouering of his right in that behalfe.

¶ The seuenth question of the Student.

Cap. 8.

IF a mã take distres for debt vpon an obligation, or vpõ a cõtract, or such other thing ꝑ he hath right title to haue, but ꝑ he ought not by ꝑ law to distraine for it, & nevertheles hee kee-

eth

eth the same distresse in pound till he be paid of his duty, what restitution is hee bound to make in this case? whether shall he repay ỹ mony because he is come to it by an vnlawfull meanes, or onely to restore the party for the wrongfull taking of the distres, or for neither, I pray you shew me? D. what is the Law in this case? S. That he that is distrained may bring a special action of trespasse against him ỹ distraineth, for ỹ he tooke his beasts wrongfully, and kept them till he made a fine, and therefore he shal recouer ỹ fine in damages, as he shall do for the residue of trespas: for the taking of the money by such cõpulsion is takẽ in the law but as a fine wrongfully taken, though it bee his ductie to haue it. D. Yet though he may so recouer, mee thinketh that as to the repaiment of the money he is not bound thereto in conscience, so that hee take no more thã of right he ought to haue, for though hee come to it by an vnlaw meane, yet when the money is paid him, it is his of right, & he is not bound to repay it, vnlesse it be recouered as thou saidst, & then when he hath repaied it, hee is as me thinketh restored to his first action: but to the redeliuery of the beasts with such damages & such hurt as he hath by the distres, I suppose he is bound to make recõpẽce of thẽ in cõscience without cõpulsion or suit in ỹ law: for though hee might lawfully haue sued for his duety in such maner as the law hath ordred, yet I agree well that he may not take vpon him to bee his owne iudge, and to come to his ductie against the order of the Law, and therefore if any hurt come to the party by the disorder, he is bound to

restore

before it. But I would think it were the more doubt if a man take such a distresse for a trespas done to him, and keepeth the distres till amends be made for the trespas: for in that case the damages be not in certaine, but be arbitrable either by the assent of the parties or by men: and it seemeth that there is no assent of the partie in this case, specially no free assent, for that hee doth it by compulsion and to haue his distresse againe, & so his assent is not much to be pondered in that case, for all his assessing of him that tooke the distresse, & so hee hath made himselfe his owne Iudge and that is prohibited in all lawes: but in that case where the distres is taken for debt, he is not his own iudge for the debt was iudged in certaine before by the first contract, and therefore some thinke great diuersitie betwixt the cases. St. By that reason it seemeth, that if hee that distraineth in the first case for the debt take any thing for his damages, that he is bound in conscience to restore it againe, for damages be arbitrable, and not certaine no more than trespas is, & mee seemeth that both in the case of trespas and debt, he is bound in conscience to restore that he taketh, for though he ought in right to haue like sum as he receiueth, yet hee ought not to haue the money that he receiueth, for hee came to the money by an vniust meanes, wherefore it seemeth he ought to restore it againe. D. And if hee should bee compelled to restore it againe, should hee not yet (for that he receiued it once) bee barred of his first action notwithstanding the payment?

S. I will not at this time clerely assoile thee that question, but this I wil say, that if any hurt come to him thereby, it is through his own default, for that he would do against the law: but neuertheless a little I will say to thy question, that as me seemeth when hee hath repayd the mony, that he is restored to his first action. As if a man condemned in an actiõ of trespas pay the money, and after the defendant reuerse the iudgement by a writ of Errour, and haue his money repaid, then the plaintife is restored to his first action. And therefore if hee that in this case toke the money, restore that he took by the wrongfull distresse, or that he ordered the matter so liberally, that the other murmure not, ne complaine not at it, me seemeth he did very wel to be sure in conscience: and therefore I would aduise euerie man to bee wel ware how hee distraineth in such cases against the law. D. Thy counsel is good, & I note much in this case that the partie may haue an actiõ of trespas against him that distraineth, so that hee is taken in the law but as a wrong doer, & therfore to pay the mony againe is the sure way, as thou hast sayd before. And I pray thee now shew me for what a man may lawfully distrain as thou thinkest.

¶ For what thing a man may lawfully distraine.

Cap. 9.

A Man may lawfully distraine for a Rent seruice, and for all maner of seruices, as homage,

mage, Fealtie, Elcuage, ſuit of Court, reliefes, and ſuch other. Alſo for a rent reſerued vpon a gift in taile, a leaſe for terme of life, for yeres, or at will, if hee reſerue the reuerſion, the lord ſhall diſtraine of common right, though there bee no diſtreſſe ſpoken of. But in caſe a man make a feoffement and that in fee by Indenture, reſeruing a rent, he ſhall not diſtraine for that rent vnleſſe a diſtreſſe bee expreſſely reſerued: and if the feoffement bee made without a deed reſeruing a rent, that reſeruation is void in Law, and hee ſhall haue the rent only in conſcience, and ſhall not diſtraine for it. And like Law is where a gift in tayle or a Leaſe for terme of life is made, the remainder ouer in fee reſeruing a rent, that reſeruation is void in law.

Alſo if a man ſeiſed of land for terme of life graunteth away his whole eſtate, reſeruing a rent, that reſeruation is voyd in the Law, without it be by Indenture, and if it be by Indenture, yet he ſhall not diſtraine for the rent but a diſtreſſe bee reſerued. Alſo for Amerciament in a Leete, the Lord ſhall diſtraine. But for Amerciament in a Court baron he ſhal not diſtraine.

Alſo if a man make a leaſe at Michaelmas for a yeare, reſeruing a rent payable at the leaſt of the Annuntiation of our Lady and Saint Mich. the Archangell, in that caſe hee ſhall diſtraine for the rent due at our Lady day, but not for the rent due at Michaelmas, becauſe the terme is expired.

But if a man make a Leaſe at the feaſt of

Christmas for to endure to the feast of Christmas next following, that is to say, for a yeare, reseruing a rent at the aforesaid Feast of the Annuntiation of our Ladie and Saint Michael the Archangel, there he shall distraine for both the rents as long as the terme continued, that is to say, till the aforesaid Feast of Christmas.

And if a man haue Land for terme of life of John at Noke, & maketh a lease for terme of yeares reseruing a rent, the rent is behind, and John at Noke dieth, there he shall not distrain because his reuersion is determined.

Also if he to whose vse fessées bin seised maketh a lease for terme of yeares, or for terme of life, or a gift in taile reseruing a rent, there the reseruation is good and the lessour shall distraine.

And if a townеship be amerced & the neighbours by assent assesse a certaine summe vpon euery inhabitant, & agrée that if it bee not paied by such a day, that certaine persons thereto assigned shall distraine: In this case the distresse is lawful. If Lord and Tenant bee, and if the tenant do hold of the Lord by fealtie and rent, and the Lord doth graunt away the fealtie reseruing the rent, and the tenaunt attourneth, in this case, hee that was Lord may not distraine for the rent, for it is become a rent secke. But if a man make a gift in taile to another, reseruing fealtie & certaine rent, and after that hee graunteth away the fealtie reseruing the rent and the reuersion to himselfe, in this case hee shall distraine for the rent, for the graunt of the

fealtie

fealtie is boyd, for the fealtie cannot be seuered from the reuersion. Also for heriot seruice the Lord shall distraine, and for heriot custome he shall seaſe and not distraine. Also if a rent be assigned to make a partition or assignement of Dower egall, hee or shee to whom the rent is assigned may distraine: and in all these cases aboueſaid, where a man may distraine, hee may not distraine in the night, but for damages feasant, that is to say, where beastes doe hurt in his ground he may distraine in the night. Also for wastes, for reparations, for accoimpts, for debts vpon contracts, or such other, no man may lawfully distraine.

¶ The 8. question of the Student.

Cap. 10.

IF a man doe treſpaſſe, and after make his executors, and die before any amends made: whether be his executors bound in conſcience to make amends for the treſpaſſe if they haue ſufficient goods thereto, though there be no remedy againſt them by the law to compell them to it? Doct. It is no doubt but they are bound thereto in conſcience, before any other deed in charitie, that they may do for him of their owne deuotion. St. Then would I wit, if the teſtatour made Legacies by his will, whether the executors be bound to doe firſt, that is to say, to make amends for the treſpas, or to pay the Legacies, in caſe they haue no goods to doe both? D. To pay legacies: for if they ſhold firſt

make recompence for the Trespasse and then haue not sufficient to pay the Legacies, they should be taken in the law as wasters of their testators goods: for they were not compellable by no law to make amends for the trespas, because euery trespas dyeth with the person, but the legacies they should bee compelled by the Law spirituall to fulfill, and so they should be compelled to pay the Legacies of their owne goods, and they shall not be compelled thereto by no law ne conscience: but if the case were that he leaue sufficient goods to doe both, then me thinketh they be bound to do both, and that they be bound to make amends for the Trespasse, before they may doe any other charitable dæd for the Testator of their owne minde, as I haue said before, except the funeral expences that be necessary, which must be allowed before all other things. S. And what the prouing of the Testament.

D. The Ordinarie may nothing take by cõscience therefore, if there be not sufficient goods besides for the funerals, to pay the debts, & to make restitution. And in likewise the Executors be bound, to pay debts vpon a simple contract, before any other dæd of charitie, that they may doe for their Testator of their owne deuotion, though they shall not bee compelled thereto by the Law. S. And whether thinkest thou that they bee bound to doe first, that is to say, to make amends for the trespas, or to pay the debts vpon a simple contract. D. To pay the debts, for that is certaine and the trespasse is arbitrable.

S. Then

S. Then for the plainer declaration of this matter and other like, I pray thee shew me thy mind, by what law it is, that if a man make executours, and that the executors, if they take vpon them, be bound to performe the will, and dispose the goods that remaine for the Testatour. D. I thinke that it is best by the law of reason. S. And me thinketh that it should be rather by the custome of the Realme. D. In all Countries and in all lands they make Executors. S. That seemeth to be rather by a generall custome, after that the law and custome of propertie was brought in, than by the law of reason: for as long as all things were in common, there were no executors ne wils, ne they needed not them, and when propertie was after brought in, me thinketh that yet making of executors, and disposing of goods by will, after a mans death, followeth not necessarily therupō: for it might haue bin made for a law, that a mā should haue had the propertie of his goods onely during his life, & that then his debts payed, all his goods to haue bene left to his wife and children, or next of his kin, without any legacies making thereof, and so might it now be ordained by statute, and the statute good & not against reason: wherfore it appeareth that executors haue no authoritie by the Law of reason, but by the Law of man. And by the old Law and custome of the Realme a man may make executors and dispose his goods by his will, and then his executors shall haue the execution thereof, and his heires shall haue nothing, but if any particuler custome helpe: and

the executors shall also haue the whole possession, and disposition of all his goods and chatteles aswel realt as personall, though no word be expressly spoken in the will, that they shall haue them: and they shal haue also actions to recouer all debts due to ỹ testator, though all debts & legacies of the testator be paid before, & shall haue the disposition of them to the vse of the testator, & not to their own vse: and so me thinketh that the authority to make executors, and that they shall dispose the goods for the Testator, is by the custome of the Realme: But then I thinke as thou sayest, that by the Law of God they shall be bound to doe the first, that is to the most profit of the soule of their testatour where the disposition therof is left to their discretion, and that I agree well, is to pay debts vpon contracts, & to make amends for wrong done to ỹ testator, though they bee not cõpelled thereto by the law & custome of the Realme, if there be none other debt nor legacie that they be bound to pay by the law: but if two seuerall debts be payable by the Law, then which debt they shal do first in conscience, I am somewhat in doubt. D. Let vs first know what the common law is therein. S. The common law is, ỹ if the Testator owe x. l. to two men seuerally by Obligation, or by such other maner that an action lyeth against his Executors thereof by the Law, and he leaueth goods to pay the one and not both, that in that case he that can first obtaine his Iudgement against the Executours, shall haue execution of the whole, and the other shall haue nothing, but to which of them

them he shall in conscience owe his favour, the common L. notwithstanding. Do. Therein must be considered the cause why the debts began, & then he must after conscience, beare his lawfull favour to him that hath ꝑ clerest cause of debt, and if both have like cause, then in conscience her must beare his favour where is most need and greatest charitie.

St. May the executors in that case delay that action that is first taken, if it stand not with so good conscience to bee payed, as another debt whereof no action is brought, and procure that an action may be brought thereof, and then to confesse that action, that he may so have execution, and then the executors to be discharged against the other? D. Why may he not in that case pay thother without action, and so be discharged in the law against the first?

Stu. No verily, for after an action is taken, the executor may not minister the goods so, but that hee leave so much as shall pay the debt, whereof the action is taken: and if he doe not, he shall pay it of his owne goods, except an other recover, and have Judgement against him hanging that action, and that without coyn.

D. Then to answer to thy question, I think that by delayes that be lawfull, as by Essoin, Emparlance, or by Dilatory plée in abatement of the writ that is true, he may delay it: but he may plead no untrue plée to preferre the other to his duetie. But I pray thee, what is the law of legacies, restitution, & debts, upon contracts, that percase ought rather after charitie

to

to be paid than a debt vpon an obligatiō, what may the fauor of the Executor doe in these cases? S. Nothing, for if they either performe legacies, make restitutions, or pay debts vpon contracts, and kéep not sufficient to pay debts which they are compellable by the law to pay, that shalbe taken as a Deuastauerunt bona testatoris, that is to say, That they haue wasted the goods of their testator: and therefore they shalbe compelled to pay the debts of their own goods: & so it is if they pay a debt vpon an obligation, whereof the day is yet to come, though it be the clérer debt, and that be the more charitie to haue it paid. D. Yet in that case if hée to whom the debt is alreadie owing, forbeare till after the day of the other obligation is past, then he may pay him without danger. S. That is true, if there be no action taken vpon it, and though there be, yet if that action may bée delayed by lawfull meanes, as thou hast spoken of before, til after the day, and that an action is taken vpon it, then may the executors confesse the action, and then after Iudgement hée may pay the debt without danger of the law. D. Is not that confession of the action so done of purpose, a couin in the law? S. No verily, for couin is where the action is vntrue, & not where the Executors beare a lawfull fauor. Do. The Ordinarie vpon the accompt in all the case before rehearsed, will regard much what is best for the Testator. St. But hee may not driue them to accompt against the order of the common Law.

The

¶ The 9. queſtion of the Student.

Cap. 11.

A Man is indebted to another vpō a ſimple contract in 20.l. & he maketh his will & bequeatheth 20. l. to H. part & dieth, and leaueth goods to his executors onely to burie him with, and to performe the ſaid legacie, and after the ſaid executors deliuer the goods of their Teſtatour in performance of the ſayd bequeaſt: whether is hee to whom the bequeaſt is made, bound in conſcience to pay the ſaid debt vpon the ſimple contract, or not? D. Is hee not bound thereto by the Law? S. No verily. D. And what thinkeſt thou hee is in conſcience? S. I think that he is not boūd thereto in conſcience, for hee is neither Ordinarie, Adminiſtratour, nor Executour. And I haue not heard that any man is bound to pay debts of any man that is deceaſed, but hee be one of thoſe three: for the goods that the teſtatour left to the executours were neuer charged with the debt, but the perſon of the Teſtatour while he liued was onely charged with the debt, and not his goods, and his executors that repreſent his eſtate after his death, hauing goods thereto of the teſtators, be charged alſo with the debts, and not the goods. And therefore if an Executor giue away or ſell all the goods of the Teſtatour, or otherwiſe waſt them, he that hath the goods is not charged with the debts in Law nor conſcience, but the Executor ſhall bee charged of his owne goods

goods. And in likewise if Jo. at Noke owe to A. B. xx. l. and A. B. oweth to C. D. xx. l. and after A. B. dieth intestate hauing none other goods but the said xx. l. which the sayd John at Noke oweth him, yet the sayd C. D. shall haue no remedie against the said Jo. at Noke, for he standeth not charged to him in Law nor conscience. But the Ordinarie in this case must commit Administration of the goods of the sayd A. B. And the said Administrator must leuie the mony of the sayd John at Noke, and pay it to the sayd C. D. and the sayd Jo. at Noke shall not pay it himselfe, because he is not charged therewith to him: and no more mee thinketh in this case, that he to whom the bequest is made, is neither charged to him that the money was owing to, in the Law or conscience. Do. Then shew mee thy mind by what law it is grounded as thou thinkest that Executors be bound to pay debts before legacies: whether is it by the law of God, or by the law of reason, or by the Law of man, as thou thinkest? S. I thinke that it is both by the law of reason, & by the law of God: for reason will that they shal doe first that is best for the testator, and that is to pay debts that their testator is bound to pay, before legacies, that he is not bound to. And also by the law of God, they are bound to pay the debts first: for sith they are bound by the law of God to loue their neighbour, they are bound to do for him that shall be best for him, when they haue taken the charge thereto, as Executors doe when they agree to take the charge of the will of their Testatour

vpon

vpon them: and it is better for the testator that his debts be paid (wherefore his soule shal suffer paine) than that his legacies be performed, wherefore hee shall suffer no paine for the performing of them.

And that is to bee vnderstood, where the legacie is made of his own free will, & not where it is made as a satisfaction of any dutie. And after the saying of S. Gregorie, the verie true proofe of loue is the deed. But this man is not in that case, for he tooke neuer the charge vpon him to pay the debts of the Testatour, and therefore hee is not bound to them in Law nor conscience as me seemeth: But rather the executors should haue bin ware ere they had paid the legacies, seeing there were debts to pay.

D. The Executors might no otherwise haue done in this case, but to pay the Legacies: for thē they should haue bēn cōpelled by the Law to haue paid, and so they could not haue bin to haue paid the debt vpon a contract, and therefore they did well in performing of that legacy: but hee to whom the legacy was made ought not to haue taken them, but ought in conscience to haue suffered them, to haue gone to the payment of the debt, and sith he did not so, but tooke them where he had no right to them, it seemeth that when hee tooke them, hee tooke with them the charge in conscience to pay the debt: for sith the executors were compellable by the Law to performe that bequest and not to pay the debt, therefore when they performed that bequest, they were discharged thereby against him that the debt was owing to, in the Law and conscience,

science, and then the charge resteth vpon him that toke the goods where he ought not in cõscience to haue taken them: but if it had bẽn a debt vpon an Obligation, or such other debt, whereupon remedie hath bẽne had against the executors by the law, I there suppose though that the executors had performed the Legacy, that yet he to whom the legacie was made and performed, had not bẽn charged in conscience to the payment of the debt, for the Executours stood still charged there to of their owne goods: and hee to whom the bequest was made was only bound in cõscience to repay that hee receiued, to the Executors, because he had no right to haue receiued it, for against the Executours hee had no right thereto. St Then it seemeth in this case that in likewise he to whom the bequest was made, should repay that hee receiued to the Executours, and then they to pay it rather then he. D. The executors haue no farther medling with it as this case is, for when they performed the bequest, they were discharged against both the other in Law and conscience, & also he to whom the bequest was made, stood not in this case charged to the executors: for against them he had good title by the Law, and so this charge standeth onely against him that the debt is owing to: and the same Law that is in this case vpon a debt vpon a contract is if the testator had done a trespas whereupon he ought to haue made restitution, that is to say, that hee to whom the bequest is made, is bound to make the amends for the Trespasse: for it should bee no discharge to him to

pay

pay it againe to the Executours without they paid it euer, & it were vncertaine to him whether they should pay it or not.

And therefore to be out of peril, it is necessary that he pay it himselfe, and then he is surely discharged against all men.

¶ The 10. question of the Student.

Cap. 12.

A Man seised of certain lād in his demesne as of fee, hath issue two sonnes and dieth seised, after whose death a straunger abateth, & taketh the profit, and after the eldest sonne dyeth without issue, and his brother bringeth an Assise of Mordaunceſtor as sonne and heire to his father, not making mention of his brother, and recouereth the Land with damages from the death of his father, as he may well by the Law: whether in this case is the younger brother bound in conscience, to pay to the Executours of the eldest brother, the value of the profits of the said Land, that belonged to the eldest brother in his life, or not? Doct. What is thine opinion therein? S. That like as the said profits belonged of right to the eldest brother in his life, and that hee had full authoritie to haue released aswel the right of the said Land, as of the sayd profits, which release should haue beene a clere barre to the yonger brother for euer: That the right of the said dammages

which

which bee in the Law but a chattell, belong to his executors and not to the heire: for no manner of chattell neither real nor personal shal not after the Law of the Realme discend vnto the heire.

D. Thou saidst in the case next before, that it is not of the Law of reason, that a man shall make executors, & dispose of his goods by his will, & ỹ the executors shall haue ỹ goods to dispose, but by the law of man: And if it be left to the determination of the Law of man, That in such cases as the law giueth such chattels vnto the Executors, they shall haue good right vnto them, and in such cases as the Law taketh such chattels from them, they bene rightfully taken from them: And therefore it is thought by many, that if a man sue a Writ of right of Ward of a ward that hee hath by his owne fee, and dieth hanging the writ, and his heire sue a Resummons according to ỹ statute of West. second, and recouereth: that in that case the heire shall enioy the wardship against the executors, and yet it is but a chattell: and they take the reason to be, because of the sayd statute, and so might it bee ordained by statute that all wards should goe to the heires, and not to the Executors: Right so in this case, sith the Law is such, that the yonger brother shall in this case haue an Assise of Mortdaunceſtour as heyre to his father, not making any mention of his elder brother, and recouer damages aswell in the time of his brother, as in his owne time: It appeareth that the Law giueth the right of these damages to the heire, and therefore

for no recompence ought to be made to the executors, as me seemeth: & it is not like to a writ of Aiel, where as I haue learned in latine (sith our first dialogue) the demandant shall recouer dammages only from the death of his father, if he ouerliue the Aiel: & the cause is, for that the demandant, though his Aiel ouerliued his father, must of necessitie make his conueyance by his father, and must make himselfe son & heire to his father, & cosin and heire to his Aiel: and therefore in that case if the father ouerliued the Aiel, the abator were bounden in conscience to restore to ỹ executors of the father the profits run in his time (for no law taketh them from him) but otherwise it is in this case, as me seemeth. St. If the ponger brother in this case had entred into the land without taking any assise of Mortdancestor as hee might if hee would, to whom were the abator then bounden to make restitution for those profits as thou thinkest? D. To the executors of the eldest brother: for in that case there is no law that taketh thē from them, & therefore the generall ground, which is that all chattels shall goe to the executors, holdeth in that case: but in this case that groūd is broken and holdeth not, for the reason that I haue made before. For commonly there is no generall ground in the Law so sure, but it faileth in some particuler case.

¶ The 11. question of the Student.

Cap. 13.

A Man seised of land in fee, taketh a wife, and after alieneth the land, & dyeth, after whose

death his wife asketh her dower, & the alienee refuseth to assigne it vnto her, but after she asketh her Dower again, and he assigneth it vnto her: whether is the alienée in this case bound in conscience, to giue the woman damages for the profits for the Land after the third part, from the death of her husband, or from the first request of her Dower, or neither the one nor the other? D. What is the law in this case? Stu. By the law the woman shall recouer no damages, for at the Common law the demaundaunt in a Writ of Dower, should neuer haue recouered damages: but by the Statute of Merton it is ordeined, that where the husband dieth seised, that the woman shall recouer damages, which is vnderstood the profits of the Land sith the death of her husband, and such damages as she hath by the forbearing of it: but in this case the husband died not seised, wherefore she shall recouer no damages by the Law. D. Yet the Law is, that immediatly after the death of her husband the Wife ought of right to haue her dower if she aske it, though her husbād die not seised. S. That is true.

Do. And sith she ought to haue her Dower from the death of her husband, it seemeth that shee ought in conscience to haue also the profits from the death of her husband, though shee haue no remedie to come to them by the Law: For mee thinketh that this case is like to a case that thou putteſt in our first Dialogue in latin, the 17. Chapter: That if a tenant for terme of life be disseised and dye, and the disseisor dyeth, and his heyre entreth and taketh the profits,

sits, and after he in the reuersion recouereth the lands against the heyre, as hee ought to doe by the Law, that in that case hee shall recouer no damages by the Law: and yet thou diddest agree, that in that case the heire is bound in conscience to pay the damages to the demandant, and so mee thinketh in that case, that the feoffee ought in conscience to pay the damnages from the death of her husband, seeing that immediatly after his death she ought to haue her dowyer. St. Though she ought to bee indowed immediatly after the death of her husband, yet shee can lay no default in the feoffee till shee demand her dower vpō the ground, and that the tenant be not there to assigne it, or if he be there that he will not assigne it: for hee that hath the possession of land whereunto any woman hath title of dower, hath good authoritie as against her to take the profits til she require her dower: for euerie woman that demaundeth dower affirmeth the possession of the tenaunt as against her: and therefore although she recouer by action, shee leaueth the reuersion alwap in him against whom she recouereth, though he be a disseisor, and bringeth not the reuersion by her recouerie to him that hath right as other tenāts for terme of life doe. And for this reason it is that the tenaunt in a writ of Dower, where the husband dyed seysed, if he appeare the first day, may lay to excuse himselfe of dammages that hee is and all tymes hath beene readie to yeild Dower if it had been demaunded: and so he shall not be receiued to do in a writ of Cosinage, neither in the case that thou remembrest

abone, for in both cases the tenãts be supposed by the writ to bee wrong doers: but it is not so in this case, and so me thinketh it clear that ỹ lesse in this case shal neuer be bound by Law, nor conscience to yeeld dammages for the time ỹ passed before the request, but for the time after ỹ request is greater doubt: howbeit some thinke him there not bound to yeeld dammages, because his title is good, as is said before, & that it is her default that shee brought not her action. D. As vnto the time before the request I hold me content with thine opinion, so that hee assign the dower whẽ he is required, but whẽ he refuseth to assign it, thẽ I think him bound in conscience to yeeld damages for both times, though she shal none recouer by the Law. And first as for the time after the refusall, it appeareth evidently that when hee denied to assigne her dower, he did against conscience: for he did not ỹ he ought to haue done by the law, ne as he would should haue bin done to him, & so after ỹ request he holdeth her dower from her wrongfully, and ought in conscience to yeeld damages therefore. And as to the default ỹ thou allignest in her, that she take not her actiõ, ỹ forceth little, for actiõs need not, but where the party will not doe that he ought to doe of right. And for ỹ he ought of right to haue done & did it not, hee can take no aduantage: and then as to the damages before the request, me thinketh him also bounden to pay them, for when hee was required to assigne dower & refused, It appeareth that he neuer intended to yeeld dower from the beginning, & so he is a wrong doer in his owne con-

conscience: & moreouer if ẏ husband dye seised, the law is such, that if the tenant refuse to assigne dower when he is required, wherfore the woman bringeth a writ of dower against him, ẏ in that case the womā shall recouer damages aswel for ẏ time before ẏ request as after: & yet he ought not in that case after thine opinion to haue yeelded any maner of damages if hee had bin readie to assign dower whē it was demanded, as some thinketh here. S. The cause in the case that thou hast put, is for that the statute is general that the demandāt shal recouer damages, where ẏ husband died seised, & that statute hath bin alway construed, ẏ where the tenant may not say, ẏ he is, & hath bin alway readie to yeeld dower &c. ẏ the demandant shall recouer damages from the death of her husband. But in that case there is no law of the realm, ẏ helpeth for the demandāt neither cōmon law, nor statute: & furthermore though it might be proued by his refusal, ẏ he neuer intended frō the death of the husband to assigne her dower, yet that proueth not, but that hee had good right to take the profits of her third part for the time, aswel as he had of his owne two parts, till request be made, as is aforesaid: & so me thinketh ẏ notwithstanding the deniall, he is not bound to yeeld damages in this case, but for the time of the request, & not for the time before. D. For this time I am content with thy reason.

¶ The 12. question of the Student.

Cap. 14.

A Man seised of certain lāds, knowing that another hath good right & title to them, le-

useth a fine with Proclamation, to the intent hee would extinct the right of the other man, & the other man maketh no claime within the v. yeares, whether may he that leued the fine hold the land in conscience as he may do by the law? D. By this question it seemeth that thou doest agree, that if he that leuyed the fine had no knowledge of the other mans right, that his right should then bee extincted by the fine in conscience. Stu. Yea verily, for thou diddest shew a reasonable cause why it should bee so in our first Dialogue in Latine the 24. Chapter, as there appeareth. But if he that leuied a fine and that would extinct the right of another, knew that the other had more right than he, then I doubt therein: for I take thine opinion in our first Dialogue to be vnderstood in conscience, where he that would extinct former rights by such a fine with proclamatiō, knoweth not of any former title, but for his more surety, if any such former right be, he taketh the remedy that is ordained by the law. D. Whether doest thou meane in this case that thou puttest now that he þ hath right, knoweth of þ fine, wilfully letting the v. yeares passe without claime, or that he knoweth not any thing of the fine?

St. I pray thee let me know thine opinion in both cases, and whether thou thinke that he that hath right bee barred in either of the said cases by conscience as hee is by the Law, or not. D. I will with good will hereafter shew thee my mind therein: but at this time I pray thee giue a little sparing and proceed

now

now for this time to some other question.

¶ The 13. question of the Student.

Cap. 15.

A Man seised of certain lands in fee hath a daughter, which is his heire apparāt, the daughter taketh a husband, & they haue issue, the father dieth seised, and the husband assone as he heareth of his death, goeth toward the land to take possession, & before he cā come there, his wife dieth, whether ought he to haue the lād in conscience for term of his life, as tenant by the curtesie, because he hath doue ꝑ in him was to haue had possess. in his wifes life, so that he might haue bin tenant by the curtesie according to the Law, or that he shall neither haue it by the law, nor conscience? D. Is it clerely holden in the law that he shall not be tenant by the curtesie in this case, because hee had not possession in deed?

S. Verily, and yet vpon a possession in law a woman shal haue her dower, but no man shal be tenant by the curtesie of Land, without his wife haue possession in deed. D. A man shall be tenāt by the curtesie of a rent though his wife dye before the day of payment, & in likewise of an Annowson though she die before the anoydance. S. That is truth for the old custome and Maxime of the law is, that he shal be so, but of land there is no Maxime that serueth him but his wife haue possession in deed D. And what is the reason that there is such a maxim in the

law of the rent & of the aduowson, neither the of land when the husband doth as much as in him is to haue possession and cannot? S. Some assigne the reason to be because it is impossible to haue possession in deed of the rent, or of aduowson before the day of payment of the rent, or before ꝑ aduoidāce of the aduowson. D. And so it is impossible that he should haue possession in deed of Land if his wife dye so soone that he may not by possibilitie come to the Land after his fathers death, & in her life as the case is. S. The law is such as I haue shewed thee before and I take the very cause to be, for that there is a Maxim serueth for the rent and the aduowson, & not for the lands as I haue said before, and as is said in the 8. chap. of our first Dialogue, it is not alway necessarie to assigne a reason or consideration why the Maximes of the law of England were first ordeined & admitted for Maximes, but it sufficeth that they haue bin alway taken for law, and that they be neither contrarie to the law of reason, nor to ꝑ law of God as this Maxime is not, & therefore if the husband in this case bee not holpen by cō=science, he cannot be holpen by the law. D. And if the law help him not, conscience cannot helpe him in this case, for conscience must alway bee grounded vpon some law, and it cannot in this case be grounded vpon the Law of reason, nor vpon the law of God, for it is not directly by those lawes that a man shall be tenant by curte=sie, but by the custome of the realme. And therefore if the custome help him not, he can nothing haue in this case by conscience: for conscience

neuer resisteth the law of man, nor addeth nothing to it, but where ỹ law of man is in it self directly against the Law of reason, or else the Law of God, and then properly it cannot be called a law, but a corruption, or where the generall grounds of the law of man worketh in any particuler case against the said Lawes as it may doe, & yet the law good, as it appeareth in diuers places in our first dialogue in Latin, or els, wher there is no law of mā provided for him that hath right to a thing by ỹ law of reason, or by the law of God. And then sometime there is remedie given to execute that in conscience, as by a Subpena, but not in al cases: for sometime it shal be referred to the conscience of the party, & vpon this ground (that is to say) that when there is no title giuen by the common Law, that there is no title by conscience: There be diuers other cases, whereof I shall put some for an example. As if a Reuersion be granted vnto one, but there is no attornement: or if a new rent be granted by word without deed, there is no remedie by conscience, vnlesse the said grants were made vpon consideration of money, or such other. And in likewise where he that is seised of lands in Fee simple maketh a will therof, that wil is void in conscience, because the ground serueth not for him whereby the conscience should take effect, that is to say, the law. And if the tenant make a Feoffement of the land that he holdeth by priority, & taketh estate againe, and dieth (his heire within age) the Lord of whom the land was first holde by priority, shall haue no remedy, for the bodie by con-

cõscience, for the law that first was with him, is now against him, & therefore cõscience is altered in likewise as the law altereth. And diuers and many cases like be in the Law that were too long to rehearse now. And thus mée thinketh that if the Law be as thou sayest, the husband in this case hath neither right by the Law, nor conscience.

¶ The 14. question of the Student.

Cap. 16.

A Rent is grãted to a mã in fée to perceiue of two acres of lãd, & after the grãtor enfeoffeth the grauntée of one of the sayd acres, whether is the whole rent extinct thereby in cõscience as it is in the law? D. This case is somwhat vncertain: for it appeareth not whether the grantor enfeoffed him on trust, or that he gaue the acre to him of his mére motion, to the vse of the said feoffée, or else that the feoffement was made vpon a bargaine, & if it were but only a feoffement of trust, then I think the whole rent abideth in conscience though it be extincted in the Law: & first that it continueth in that case in conscience, for the part that the grantée hath to the vse of the grantor it is euident, for he may not take the profits of the lãd, and it is against conscience that he should leése both, & in likewise it abideth in conscience for the acre ꝑ remaineth in the hãds of the grauntor, though it be extinct in the Law: For there was a default in the grauntor that hee would make the feffemẽt to the grãtée, aswel as there was

was in the grantee to take it. And it is no conscience that of his owne default he should take so great auaile to be discharged of the whole rent, seeing that the feffement was made to his own vse. And if the feoffement were made vpon a bargaine & a contract betweén them, then it is to see whether they remembred the rent in their bargaine, or that they remembred it not, & if they remẽbred it in their bargain & contract, then conscience must follow the bargaine: As thus, if they agreed that the Graunteé should haue the rent after the portiõ in the other acre, then by conscience he ought to haue it though it be extincted in the law: And if they agreed that the whole rent should be extinct, and made their price according, then it is extinct in law & conscience: & if they cléerely forgot it & made no mention of it, or for lacke of cunning toke the Law to be, that it should continue in the other acre after the portion, and made their price according, pondering onely the value of the acre that was sold, then mée thinketh it doth continue in conscience after the portiõ: & if the feffement were made to the vse of the granteé, then it séemeth the whole rent is extinct in law and conscience. S. Then take this to be the case, that is to say, that the feoffement was made to the vse of the granteé. D. What is thẽ thine opiniõ therin? S. That the rent should abide in conscience after the portion of the acre remaining in the hands of the grantor, notwithstãding it be extinct in the law. D. Then shew me thine opiniõ in this that I shal aske thée: Of what law is it that graunts of rent and of such other

profits out of lāds may be made, and that they shalbe good & effectual to the grantees, whether it is by the law of reason, or by the law of god, or by the custom & law of the realm. S. I think it is by the law of reason: for by ꝑ same reason that a mā may giue away al his lands, he may as it semeth giue away the profits thereof, or graunt a rent out of the land if he will. D. But then by what Law is it that a man may giue away his lāds? I trow by none other law but by the custome of the Realme, for by statute all elienations and gifts of lands may be prohibited, & thē that reason proueth not that graunts of the profits of land or of a rent, should be good because he may alien the land: if alienation of Land be by custome & not by the Law of reason, as I suppose it is, whereof I haue touched some what in our first Dialogue in Latin the 19. Chapter. And also if Graunts should haue their effect by the Law of Reason, then Reason would they should be good by the onely word of the Graunter, as well as by his deed. And that is not so, for without deed the grant of rent is void in law: and so me thinketh that graunts haue their effect onely by the Law of the Realme. St. I admit it be so, what meanest thou thereby? Do. I shall shew thee hereafter, as I shall shew thee the cause why I think the rent is extinct in conscience, as well as in law. And first as I take it, the reason why it is extinct in the law, is because the rent by the first grant was going out of both acres, and was not going part out of the one acre, and part out of the other, but the whole rent was going out

of

of both, and then when the grantee of his own folly will take estate in the one acre, whereby that acre is discharged, then the other acre also must be discharged, vnles it should be apportioned, and the law will not that any apportionment should be in that case, but rather inasmuch as the partie hath by his owne act discharged the one acre, the law discharged also the other, rather than to suffer the other acre to be charged contrarie to the forme of the graunt: For this rent beginneth all by the act of the partie. And as I haue heard it is called, a rent against common right. Wherefore it is not fauored in the law, as a rent seruice is: and then me thinketh that forasmuch as it is not grounded by the law of reason, that grants of rent should be made out of land, but by custome and law of the realm, as I haue said before: that so in like wise it remaineth to the law and custom of the realme, to determine how long such rents shal continue. And when the law iudgeth such rent to bee void, I suppose that so doth conscience also, except the iudgement of the law be against the law of Reason or the law of God, as it is not in this case. For in this case he that taketh the feoffement hath profit by the feffement, and knoweth that hee hath such a rent out of the land & that this purchase should extinct it, whereby it appeareth that hee assenteth vnto the Law, whereto he was not compelled, and that is his owne act and his owne default so to do, which shal extinct his whole rent aswel in conscience as in law. But if he haue no profit of the Land, or be ignorant that hee hath such a rent out of

the

the land, which is called ignorance of the deed, or if hee bee ignorant that the Law would extinct his whole rent thereby, which is called ignorance of the Law, then mee thinketh it remaineth in conscience after the portion. S. Ignorance of the law or ỹ deed helpeth not but in few cases in the Law of England. D. And therfore it must be reformed by conscience, that is to say, by the law of reason, for when the general Maxims of the law be in any particuler cases against ỹ law of reason, as this Maxime seemeth to bee, because it excepteth not thē that be ignorant though it be an ignorance invincible, then doth it not agree with the law of reason. S. Me thinketh that ignorance in this case helpeth little: For when a man buyeth any lād or taketh it of the gift of any other, hee taketh it at his peril, so that if the title bee not good, ignorance cannot help, for the buier must beware what hee buyeth: & so in this case if the taking of an acre should extinct the whole rent in conscience, if hee were not ignorant, so mee thinketh it should in likewise extinct it also though he be ignorant of the law or of the deed: for euery man must be compelled to take notice of his owne title, and out of what land his rent is going. & so me thinketh ignorance is but little to be considered in this case. D. If a man buy lād or taketh it of the gift of another, it is reason that hee take it with the peril, though hee bee ignorant that another hath right: for it were not standing with reason that his ignorance should extinct the right of another, but in this case there is no doubt of the right of the Land:

but

but all the doubt is how the rent shal be ordred in conscience, if he that hath the rent take part of the land: & therin is great diuersitie between him that is ignorant in the Law, and him that knoweth the law, & knoweth well also that he hath a rent out of the Land, and other. For I put case that hee asked counsaile of the grauntor himselfe therein, & he saying as he thought, told him that the taking of the one acre should not extinct the rent but for the portiõ, and so he thinking the law to bee, tooke the other acre of his gift: Is it not reasonable in that case, that the ignorance should saue the Rent in conscience? St. Yes, for there the grauntor himselfe is party to his ignorance, and in maner the cause therof. Do. And me thinketh all is one, if any other had shewed him so, or if he asked no counsaile at all, for mee thinketh it suffiseth in this case that hee bee ignorant of the Law: for why, it is more hard in this case to proue the Rent should be extinct in consciẽce, though he knew it should bee extinct in the Law, than to proue that it continueth in conscience after the portion if he be ignorant, and thou thy selfe were of the same opinion, as it appeareth in the beginning of this present Chapter: But if the opinion were true, it would bee hard to proue but that the said generall Maxime were wholy against reasõ, and then it were void, but I haue sufficiently auniswered thereto as mee seemeth, & that it is extinct in the law, and also in conscience, except ignorãce help it to be apporcioned. And moreouer, forasmuch as apporcionment is suffered in the Law, where part of the land

discen-

discendeth to the graunter, because no default can be assigned in him: some thinke no default can be assigned in him in conscience, when he is ignorant of the Law or of the deede, though such ignorance do not excuse in the law of the realme. St. I am content with thy opinion in this behalfe at this time.

¶The 15. question of the Student.

Cap. 17.

A Man graunteth a Rent charge out of two acres of land, and after the graunter infeoffeth H. H. in one of the said two acres to the use of the said H. H. and of his heires, & after the said H. Hart, intending to extinct all the rent, causeth the said acre to bee recouered against him to his owne use in a writ of Entry in the Post in the name of the graunter and of others after the common course, the graunter not knowing of it, and by force of the said recouery the other demaundants enter and dispossessing the graunter, so that the graunter is seised of all by the surrupuor to the use of the said H. H. whether is the said rent extinct in conscience in part, or in all, or no part? D. I am in doubt of the law in this case. S. In what point? D. whether the whole rent bee going out of the acre that remaineth in the hands of the grauntor, because the graunter commeth to the Land by way of recouerie, or that it shall be extinct in law but after the portion, because the graunter hath not the acre to his owne use, or that the whole

whole rent shall be extinct in the Law. St. The rent cānot be whole going out of the acre that the graūtour hath: for this recouerie is vpon a feined title, and the graūtour because hee is straunge to it shall be well receiued to falsifie it. But if the Recouerie had bene vpon a true title, then it had bene as thou sayst, if the graūtee recouer the one acre against the graūtour vpon a true title, the graūtour shall pay the whole rent out of that Land that remaineth in his hand: and as to the vse it maketh no matter to the graūtor as to the law in whom the vse bee: for the possession without the vse extinguisheth the whole rent as against him in the law, aswel as if the possession and vse were both ioined together in the graūtee.

Do. Then mee thinketh that the said Henry Hart is bound in conscience to pay the graūtee the rent after the portion of that acre that was recouered, for it cannot stand with conscience that hee should lose his rent, and haue no profits of the land. S. Then of whom shall he haue the other portion of his rent? Do Is the law clere that the acre that the graūtor hath shall be in this case discharged in the law? St. I take the law so.

Do. And what in conscience? St. As against the graūtor me thinketh also it is extinct in cōscience, for the reason that thou hast made in the 16 Chaper. For it is all ons in conscience in this case as against the graūtour, whether the recouerie were to the vse of the graūtee or not, specially seing that the graūtour is not prime to the recouerie: for the vnity of possessiō

is ỹ cause of extinguishment of the rent against the grantor both in law and conscience, wheresoeuer the vse bee. But if the grauntor had bin priuie to the cause of extinguishment, as hee was in the case that I put in the last Chapter, where the grauntor enfeoffed the grantee of one of the acres to the vse of the grantee, there it is not extinct in conscience in that acre that remaineth in the hands of the grantor, though it be extincted in the law, because hee was priuie to the extinguishment himselfe: but he is not so in this case, & therefore it is extinct against him in law & conscience. And therefore me thinketh, that the graunte shall in conscience haue the whole rent of the said H. Hart, that caused the said recouerie to be had in his name, for in him was all the default: but it is to be vnderstood, that in all the cases, where it is said before in this chapter, or in the chapter next before, that the rent is extinct in the law, and not in conscience, that in such case, all the remedies that the partie might first haue had for the Rent at the common Law by distresse, assise, or otherwise, are determined, & the partie that ought to haue the rent in conscience, shall bee driuen to sue for his remedie by Subpena. D. I am content with thy conceit in this matter for this time.

¶ The 18. question of the Student.

Cap. 18.

A Villeine is graunted to a man for terme of life, the villeine purchaseth Lands to him and

and to his heirs, the tenant for terme of life entreth: in this case by the Law he shall enioy the lands to him and to his heires, whether shal he do so in likewise in conscience?

D. Mee thinketh it first good to see whether it may stand with Conscience, that one man may claime another to be his villeine, and that he may take from him his lands and goods, & put his body in prison if hee will: it seemeth hee loueth not his neighbour as himselfe that doth so to him.

St. That Law hath bin so long vsed in this Realme and in other also, and hath bin admitted so long in the Lawes of this Realme, and of diuers other lawes also, and hath bin affirmed by Bishops, Abbots, Priours, and many other men both Spirituall and Temporall, which haue taken aduantage by the said law, and haue seised the Lands and goods of their villeines thereby, and call it their right enheritance so to doe: that I thinke it not good now to make a doubt, ne to put it in argument whether it stand with conscience or not, and therefore I pray the, admitting the Law in that behalfe to stand in Conscience, shewe me thine opinion in the question that I haue made.

D. Is the law cléere that hee that hath the villeine but onely for terme of life, shall haue the lands that that villein purchaseth in fee to him and to his heirs.

S. Yee verily I take it so.

D. I should haue take the law otherwise: for

If a Seigniorie be graunted to a man for terme of life and the tenant attourne, & after the lord eschcat, and the tenant for term of life entreth, he shall haue there none other estate in the land than he had in the Seigniorie: & mee thinketh that it should bee like law in this case, and that the Lord ought to haue in the Land, but such estate as he hath in the villeine. St. The cases bee not alike, for in the case of the escheate the tenant for terme of life of the Seigniorie, hath the lands in the lieu of the Seigniorie, that is to say, in the place of the Seigniorie, & the Seigniory is clerely extinct: but in this case he hath not the land in the lyeu of the villaine, for hee shall haue the villiene stil as he had before, but he hath the lands as a profit come by means of the villiene, which hee shall haue in like case as the villien had them, that is to say, of all goods and chattels he shal haue the whole property, & of a lease for terme of yeares hee shall haue the whole terme, and for terme of life hee shall haue the same estate, the Lord shall haue in the land during the life of the villien, and of Land in fee simple, and of an estate taple that the villeine hath, the Lord shall haue the whole fee simple, although he had the villiene but only for terme of yeares, so that he enter or seise according to the law before the villiene alien, or else he shall haue nothing.

D. Verily, and if the law be so, I think conscience followeth the law therein. For admitting that a man may with conscience, haue an other man to be his villien, the iudgemēt of the Law in this case (as to determine what estate

the

the Lord hath in the land by his entry) is neither against the law of reason nor against the law of God, and therefore conscience must follow the Law of the Realme. But I pray thee let me make a little digression to heare thine opinion in another case somewhat pertayning to the question, and it is this: If an Executor haue a villeine, that his testator had for terme of yeares, & he purchaseth lands in fee, and thee executor entreth into the land, what estate hath he by his entry? S. A Fee simple, but that shalbe to the behoofe of the testator, & shalbe an assets in his hands. D. Wel then I am content with thy conceipt at this time in this case, and I pray thee proceed to another question. S. For almuch as it appeareth in this case & in some other before, that the knowledge of the law of Englande is right necessarie for the good ordering of the conscience: I would heare thine opinion, If a man mistake the law, what danger it is in conscience, for the mistaking of it. D. I pray thee put some case in certaine therof that thou doubtest in, & I wil with good will shew thee my mind therein, or else it wil be somewhat long or it can be plainly declared, and I would not be tedious in this writing.

¶ The 17. question of the Student.

Cap. 19.

A Man hath a Villeine for terme of life, the villein purchaseth lands in fee as in the case

of the laſt Chapter, and the tenaunt for terme of life entreth, and after the Villeine dyeth, he in the reuerſion pretending that the tenant for terme of life hath nothing in the Land, but for terme of life of the Villeine, aſketh counſaile of one that ſheweth him that he hath good right to the Land, and that he may lawfully enter, and through that counſaile he in the reuerſion entreth, by reaſon of the which entrie, great ſuits and expences follow in the Law, to the great hurt of both parties: what danger is this to him that gaue the counſaile?

D. Whether meaneſt thou that he that gaue the counſaile, gaue it willingly againſt the Law, or that he was ignorant of the Law?

St. That he was ignorant of the Law: for if he knew the Law, and gaue counſaile to the contrarie, I think him bound to reſtitutiõ, both to him againſt whom he gaue the counſaile, and alſo to his Client (if he would not haue ſued but for his counſaile) of all that they be damnified by it.

D. Then will I yet further aſke thée this queſtion, whether he of whom he aſketh counſaile gaue himſelfe to learning, and to haue knowledge of the Law after his capacitie, or that hée toke vpon him to giue counſaile, and toke no ſtudie competent to haue learning? for if he did ſo, I thinke he be bounden in conſcience to reſtitution of all the coſtes and damages that he ſuſtained, to whom he gaue counſaile, if he would not haue ſued but through his counſaile, and alſo to the other partie. But if a man that hath taken ſufficient ſtudie

in

in the law, mistake the law in some point that is hard to come to the knowledge of, he is not bounden to such restitution, for he hath done ȳ in him is: but if such a man knowing the Law giue counsell against the Law, he is bound in conscience to restitution of costs and damages (as thou hast sayd before) and also to make amends for the vntruth.

Stu. What if hee aske counsel of one that he knoweth is not learned, and hee giueth him counsell in this case to enter, by force whereof he entreth? Do. Then be they both bound in conscience to restitution, that is to say, the partie if he be sufficient, and else the Counsellour because he assented and gaue counsell to the wrong.

St. But what is the Counsellor in that case bounden to him that he gaue counsell to? Do. To nothing: For there was as much default in him that asked the counsell, as in him that gaue it, for he asked counsell of him that hee knew was ignorant, and in the other was default for the presumption, that he would take vpon him to giue counsell in that hee was ignorant.

St. But what if hee that gaue the counsell, knew not but that he that asked it, had trust in him, that hee could and would giue him good counsell, and that he asked counsell for to order well his conscience, howbeit that the trueth was, that he could not so doe?

D. Then is he that gaue the counsell bounden to offer to the other amends, but yet the other may not take it in conscience.

St. That were somewhat perilous, For haply he would take it though he haue no right to it, except the world be wel amended. D. What thinkest thou in that amendment? Stu. I trust euery man will doe now in this world as they would be done to, speake as they think, restore where they haue done wrong, refuse money if they haue no right to it, though it bee offered them, do that they ought to doe by conscience, & though that they cannot be compelled to it by no Law, and that none will giue counsell, but that they shall thinke to be according to conscience, and if they doe, to do what they can to reforme it, and not to intermit themselues with such matters as they be ignorāt in, but in such cases to send them that aske the counsell to other, that they shall thinke bee more cunning than they are.

D. It were very wel if it were as thou hast sayd, but, the more pittie, it is not alway so. And especially there is great default in giuers of counsell, for some for their owne lucre and profit giue counsel to comfort other to sue that they know haue no right, but I trust there be but few of them: and some for dread, some for fauor, some for malice, and some vpon considerations, and to haue as much done for them an other time to hide ȳ truth. And some take vpō them to giue counsell in that they be ignorant in, and yet when they know the truth will not withdraw that they haue misdone, for they thinke it should be greatly to their rebuke, and such persons follow not this counsel, that saith That wee haue vnaduisedly done, let vs with

good

good aduise reuoke again. S. And if a man giue counsell in this Realme after as his learning and conscience giueth him, and regardeth not the Lawes of the Realme, giueth he good counsell? Do. If the Law of the Realme be not in that case against the Law of God, nor against the Law of reason, hee giueth good counsell: For euerie man is bound to follow the Law of the countrie where he is, so it be not against the said Lawes, and so may the cases be, that he may bind himselfe to restitution. S. At this time I will no further trouble thee in this question.

¶ The 18. question of the Student.

Cap. 20.

IF a man of his meere motion giue lands to H. H. and to his heires by Indenture, vpon a condition, that he shall yerely at a certaine day pay to Io. at Stile out of the same land a certaine Rent, and if he doe not, that then it shalbe lawfull to the said Io. at Stile to enter &c. if the rent in this case be not payed to John at Stile, whether may the said John at Stile enter into the Lands by conscience, though he may not enter by the law? D. May he not enter in this case by the Law, sith the words of the Indenture be that he shall enter? S. No verily, For there is an ancient Maxime in the Law, that no man shall take aduauntage in a condition, but he that is partie or priuie to the condition, and this man is not party nor priuy where-

wherefore he shall haue no aduauntage of it. D. Though he can haue no aduauntage of it as partie, yet because it appeareth euidently that the intent of the giuer was, that if hée were not paied of the rent, that hée should haue the land: It séemeth that in conscience he ought to haue it, though he cannot haue it by the Law. St. In many cases the intent of the partie, is voyd to all intents, if it be not grounded according to the law: And therefore if a man make a lease to another for terme of life, and after of his meere motion he confirmeth his estate for terme of life to remaine after his death to another, and to his heires. In this case that remainder is void in law and conscience, for by the Law there can no remainder depend vpon no estate, but that the same estate beginneth at the same time that the remainder doth: And in this case the estate began before, and the confirmation enlarged not his estate, nor gaue him no new estate. But if a lease be made to a man for terme of another mans life, and after the lessor onely of his meere motion confirmeth the Land to the Lessée for terme of his owne lyfe, the remainder ouer in Fée, this is a good remainder in the law and conscience: and so mée thinketh the intent of the partie shall not bee regarded in this case. Do. And in the first case that thou hast put, mée thinketh though it passe not by way of graunt of that, yet shall it passe, as by the way of remainder of the reuersion, for euery déed shalbe taken most strong against the grauntor, and the taking of the déed in this case is an attornement in it selfe. St. That cannot

not bee, for hee in the remainder is not party to the deed, and therefore it cannot be taken by way of graunt of the reuersion: for no graunt can bee made but to him that is partie to the deed, except it be by way of remainder. And therfore if a man make a lease for terme of life, and after the lessor grant to a stranger that the tenant for term of life shal haue the land to him and to his heires, that graunt is voyd if it be made only of his mere motion without recompence. And in likewise if a man make a Lease for terme of life, and after graunt the reuersion to one for terme of life, the remainder ouer in fee, and the Tenant atturneth to him that hath the estate for terme of life only, intending that he onely should haue aduantage of the graunt, his intent is void, & both shall take aduantage therof, and the attornement shalbe taken good, according to the graunt: And so in this case, though the Feoffour intended that if the rent were not paied, that the straunger should enter, yet because the law giueth him no entrie in that case, that intent is void, & the same stranger shall neither enter into the land by law nor conscience. Do. What shall then bee done with that land as thou thinkest after the condition broken? St. I think that the feoffor in this case may lawfully reenter, for when the feoffement was made vpon condition that the feoffee would pay a rent to a stranger, in those words is concluded in the Law, that if the rent were not paid to the stranger, that the feoffor should reenter: for those words vpon condition imply so much in the law though it be not expressed.

And

And then when the feoffor went further & said that if the rent were not paid, that the stranger should enter, those words were void in ỹ law: and so the effect of the deed stood vpon the first words whereby the feoffor may reenter in law & conscience: but if the first words had not bin conditionell, I would haue holden it the greater doubt. Do. I pray thee put the case thereof in certaine with such words as bee not conditionall that I may the better perceiue what thou meanest therein.

¶ The 19. question of the Student.

Cap. 21.

A Man maketh a Feoffement by deed indented, and by the same deed it is agreed, that the feoffee shall pay to A.B. & to his heirs a certaine rent yerely at certaine dayes, & that if he pay not ỹ rent, thẽ it is agreed that A.B. or his heires shall enter into the land, and after the feoffee payeth not the rent, thẽ the question is, who ought in conscience to haue this land and rent. D. Ere wee argue what conscience will, let vs know first what the Law will therein. S. I thinke that by the law neither the feoffor ne yet the sayd A.B. shall neuer enter into the Land in this case for nonpayment of the rent, for there is no reentrie in this case giuen to the Feoffor for not payment of the rent as there is in the case next before, & the entrie that is giuen to the said A.B. for not paiment therof is void in the Law, because he is estrange to the

the deed, as it appeareth also in the next chapter before. And therefore mee thinketh that the greatest doubt in this case is to see to what vse this feoffement shal be taken.

D. There appeareth in this case as thou hast put it, no cõsideration ne recompence giuen to the feoffor, whereupon any vse may bee demed: and if the case bee so indeed, and that the feoffour declared neuer his mind therein, to what vse shall it then be taken? St. I thinke it shall bee taken to bee to the vse of the feoffee as long as he payeth the rent, for there is no reason why the feoffee should bee busied with payment of the rent hauing nothing for his labor: ne it may not conueniẽtly bee taken that the intent of the feoffour was so except hee expressed it, and then it must bee taken that he intended to recõpẽce the feoffee for the business, that he should haue in the payment ouer, and by the words following his intent appeareth to bee so, as mee thinketh, for if the rent were not payd, he would that A. B. should enter, and so it seemeth he intended not to haue any vse himselfe: and thus me seemeth this case should varie from the common case of vses, that is to say, if a man seised of land make a feffement thereof, and it appeareth not to what vse the feoffement was made, ne it is not vpon any bargaine or other recompence, then it shalbe taken to be to the vse of the feoffor, except the cõtrary can be proued by some bargaine, or other like, or that his intent at the time of the liuerie of seisin was expressed that it should bee to the vse of the feoffee or of some other, and then it

shall

shall go according to his intent: but in this case me thinketh it shalbe taken that his intēt was, that it should first be to the vse of the feoffée, for the cause before rehearsed, except the contrarie can be proued, & so that knowledge of the intēt of the feoffor is the greatest certaintie for knowledge of the vse in this case as me seemeth: but when the feoffour goeth further and saith that if the rent be not paid, that then the said B. B. should enter into the Land, then it appeareth that his intent was that the rent should cease, and that B. B. should enter into the Land, and though hee may not by those words enter into the land after the rules of the law, and to haue freehold, yet those words seeme to bee sufficient to proue that the intent of the feoffor was that hee should haue the vse of the land: for sith hee had the rent to his owne vse, and not to the vse of the feoffour, so it seemeth he shall haue the vse of the Land that is assigned to him for the paiment of the rent. Do. But I am somewhat in doubt whether hee had the rent to his owne vse: for the intent of the feoffor might bee that hee should pay the rent for him to some other, or some other vse might bee appointed thereof by the feoffor. St. If such an intent can bee proued, then the intent must be obserued: but wee bee in this case to wit, to what vse it shall bee taken if the intent of the feoffor cannot bee proued, and then me thinketh it cannot bee otherwise taken, but it shall bee to the vse of him to whom it should bee paid: for though it bee called a rent, yet it is no rent in Law, ne in the law he shall neuer haue remedy for it, though it were

were assigned to him, and to his heires without condition, neither by distresse, by assise, by writ of Annuitie, nor otherwise, but he shal be driuen to sue in the Chaunceric for his remedie, and then when hee sueth in the Chaunceric, hee must surmise that he ought to haue it by conscience, and that he can haue no remedie for it in the law. And then, sith he hath no remedy to come to it but by the way of Conscience, it seemeth it shall be take, that when he hath recouered it that he ought to haue it in cõscience, & that to his owne vse, without the contrary can be proued, and if the contrarie can bee proued, and that the intent of the feoffor was, that hee should dispose it for him as hee should appoint, then hath he the rent in vse to another vse, and so one vse should bee depending vpon another vse, which is seldome seene, and shall not bee intended till it be proued: and so, sith no such matter is here expressed, me thinketh the rent shall be taken to bee to the vse of him that it is payed to, and the Land in likewise that is appointed to him for not payment of the said rent, shall bee also to his vse, how thinkest thou, will conscience serue therein? Do. I thinke that as thou takest the Law now, that conscience (in this case) and the Law bee all one, for the law searcheth the same thing in this case, to know the case that conscience doth, that is to say, the intent of the feoffor, and therefore I would moue thee further in one thing. Stu. What is that?

D. That sith ỹ intẽt of ỹ feffor shalbe so much regarded in this case, why it ought not also

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to bee as much regarded in the case that is in ỹ last chapter next before this, where the words be conditionall, & giue the feoffor a title to reenter: for me thinketh, that though the feoffor may in that case reenter for the condition broken, that yet after this entry, he shall be seised of the land after his entry to the vse of him, to whom the Land was assigned by the sayd Indenture for lacke of payment of the rent, because the intent of the feoffor shall be taken to be so in that case as well as in this. And I pray thee let mee know thy mind, what diuersitie thou putteſt betweene them. S. Thou driuest mee now to a narrow diuersitie, but yet I will answere thee therein as well as I can. D. But first ere thou shew me that diuersitie, I pray thee shew mee how Vses began, and why so much Land hath beene put in vse in this Realme as hath bin. S. I will with good will say as mee thinketh therein.

How vses of land first began, and by what law, and the cause why so much land is put in vse.

Cap. 22.

VSes were reserued by a secõdary cõclusiõ of ỹ law of reason in this maner: whẽ the generall custom of propertie, whereby euery man knew his owne good frõ his neighbors was brought in among ỹ people: It followed of reason ỹ such lands & goods as a man had, ought not to bee takẽ from him but by his assent

assent or by order of a law: and then sith it is so that euerie man that hath Lands hath thereby 2. things in him, that is to say, the possession of the Land which after the Law of England is called the franktenement or the freehold, & the other is authoritie to take thereby the profits of the land: wherefore it followeth that he that hath land & intendeth to giue onely the possession & freehold thereof to another, & to keepe the profits to himselfe, ought in reason & conscience to haue the profits, seeing there is no law made to prohibite, but that in conscience such reseruation may be made. And so when a man maketh a feoffemēt to another and intendeth that he himselfe shall take the profits, then the feoffee is said seised to his vse that so inforced him, that is to say, to the vse that he shall haue the possession & freehold thereof, as in the Law, to the intēt that the feffor shal take the profits: and vnder this maner, as I suppose, vses of land first began. D. It seemeth that the reseruing of such vse is prohibited by the law, but if a man make a feoffemēt and reserue the profits, or any part of the profit, as the grasse, wood or such other, that reseruation is void in the law: & mee thinketh it is all one to say, that the Law iudgeth such a thing if it bee done to bee void, & that the law prohibiteth that the thing shal not be done. St. Truth it is that such reseruation is void in the law as thou saist, and that is by reason of a Maxime in the Law that willeth ỳ such reseruation of part of the same thing shall be iudged void in the law: but yet the law doth not prohibite that no such reseruation shall bee made,

but if it be made it iudgeth of what effect it shal be, that is to say, that it shall be void, and so he that maketh such reseruation offendeth no law thereby, ne breaketh no law thereby, and therefore the reseruation in conscience is good: but if it were prohibite by statute that no man should make such reseruation, ne ỹ no feffemẽt of trust should bee made, but ỹ all the feffements should bee to the vse of him to whom possession of the land is giuen: then the reseruation of such vses against the Statute should be void, because it were against the law, & yet such a statut should not be a statute against reason, because such vses were first groũded and reserued by the law of reason, but it should preuent the law of reason, & should put away the cõsideration whereupon the Law of reason was grounded before the statut made. And then to the other questiõ, that is to say, why so much land hath bẽn put in vse, it will be somewhat long & paraduenture to some tedious to shew all the causes particularly: but the verie cause why the vse remained to the feffor notwithstãding his own feffemẽt or fine, & sometime notwithstanding a recouery against him, is all vpon one consideratiõ after the cause and entent of the gift, fine, or recouery, as is aforesaid. D. Though reason may serue, that vpon a feffement a vse may be reserued to the feoffor by the intent of the feoffor against the forme of his gift, as thou hast sayd before, yet I maruell much how an vse may be reserued against a fine, that is one of ỹ highest Records that is in the law, and is taken in the Law of so high effect that it should make an

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end of all strifes, or against a recouerie that is ordeined in the law for them that bee wronged to recouer their right by: and me thinketh that great inconuenience & hurt may follow, when such Records may so lightly bee auoided by a secret intent or vse of the parties, & by a nude and bare auerrement & matter indeed, and specially sith such a matter indeed may bee alleadged & is not true, whereby may rise great strife betweene the parties, & great confusion & vncertainty in the law: but neuertheless sith our intent is not at this time to treat of that matter, I pray thee touch shortly some of the causes, why there hath bin so many persons put in estate of lands to the vse of other, as there hath bin, for as I heare say, few men bee sole seised of their owne land. St. There hath borne many causes thereof, of the which some be put away by diuers statuts, & some remain yet: wherfore thou shalt vnderstand, that some haue put their land in feoffement secretly, to the intent & they that haue right to the Land, should not know against whom to bring their action, and that is somewhat remedied by diuers Statutes that giue actions against Parnors and takers of the profits. And sometime such feoffements of trust haue bin made to haue maintenãce & bearing of their feoffees, which peraduẽture were great Lords or rulers in the Countrie: and therefore to put away such maintenance, treble damages be giuen by statute against them that make such feoffements for maintenance. And sometime they were made to the vse of Mortmaine, which might then bee made with-

out forfeiture though it were prohibited that fréehold might not be giuen in Mortmain. But that is put away by the Statute of R. 2. And sometime they were made to defraud the lords of wards, reliefes, herriots, and of the lands of their villeines: but those points bee put away by diuers statutes made in the time of king H. the 7. Sometime they were made to auoid executions vpon Statute Staple, statute Merchant, & Recognisance: & remedie is prouided for that, that a man shall haue execution of all such lands as any person is seised of to the vse of him that is so bound, at the time of execution sued in the 19. yeare of H. 7. And yet remain feoffements, fines, and recoueries in vse of many other causes, in manner as many as there did before the said statute. And one cause why they be yet thus vsed, is to put away tenancie by the curtesie, and titles of Dower. Another cause is, for that lands in vse shall not be put in execution vpon a statute Staple, statute Merchant, nor Recognisance, but such as bee in the hands of the Recognisor at the time of the execution sued. And sometime lands be put in vse that they should not be put in execution vpon a writ of Extendi facias ad valentiam. And sometime such vses bee made, that hee to whose vse &c. may declare his will thereon, & sometime for suretie of diuers conenants in Indentures of mariage, & other bargains, & these 2. last articles, be the chief & principal cause why so much land is put in vse. Also lāds in vse be not assets neither in a Formedō nor in an action of Debt against the heire: ne they shall not be put in execution

ecution by an Elegit sued vpon a recouerie as some men say: & these be the verie chiefe causes as I now remember, why so much Land standeth in vse as there doth: & all the said vses be reserued by the intēt of the parties vnderstood or agreed betweēn them, and that many times directly against the wordes of ỹ feoffement, fine, or recouerie, and that is done by the law of reason, as is afore said. D. May not a vse be assigned to a stranger, aswell as to be reserued to the Feoffor, if the Feffor so appointed it vpon his feoffement? Stu. Yes aswell, and in likewise to the feoffée, & that vpon a frée gift without any bargain or recompence, if the feoffor so will. D. what if no feoffement be made but that a man grant to his feffée, that from henceforth he shall stand seised to his owne vse, is not that vse changed, though there be no recompence? Stu. I thinke yes, for there was an vse in Esse before the gift, which he may as lawfully giue away, as he might ỹ land if he had it in possession. D. And what if a man being seised of land in fée, grāt to another of his mēre motiō without bargaine or recompence, ỹ he from thenceforth shall be seised to the vse of the other, is not that graunt good? Stu. I suppose that it is not good, for as I take the Law, a man cannot commence an vse but by liuery of seisin or vpon a bargaine or some other recompence. D. I hold me contented with that thou hast sayd in this Chapter for this time, & I pray thee shew me what diuersitie thou puttest betweene those two cases that thou hast before rehearsed in the 20. Chapter and in the 21. Chapter of this

pꝛeſent booke. St. I will with good will,

¶ The diuerſitie betweene two caſes hereafter following, whereof one is put in the 20. Chapter, and the other in the 21. Chapter of this preſent Booke.

Cap. 23.

THe firſt caſe of the ſaid two caſes is this, A man maketh a feoffement by deed indented vpon a condition, that the feoffee ſhall pay certaine rent yerely to a ſtranger, &c. if he pay it not, that it ſhalbe lawfull to the ſtranger to enter into the land. In this caſe I ſaid before in the 20. Chapter, that the ſtranger might not enter, becauſe that he was not pꝛiuie vnto the condition. But I ſaid, that in that caſe the feoffor might lawfully reenter by the firſt wordes of the Indenture, becauſe they imply a condition in the law, & that the other wordes (that is to ſay) that the ſtraunger ſhould enter, be voyd in law & conſcience. And therefore I ſaid farther, that when the feoffor had reentred, that he was ſeiſed of the land to his owne vſe, and not to the vſe of the ſtranger, though his intent at the making of the Feoffement, were that the ſtranger after his entrie, ſhould haue had the land to his own vſe, if he might haue entred by the law. And the cauſe why I thinke that the feoffor was ſeiſed in that caſe to his owne vſe, I ſhall ſhew thee afterward. The ſecond caſe is this, a man maketh a feoffement in fee, and it

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is agreed vpon the feoffement, that the Feoffee shall pay a yerely rent to a stranger, & if he pay it not, that then the straunger shall enter into the land. In this case I said as it appeareth in the sayd xxj. Chapter, that if the Feoffee payed not the rent: that the stranger should haue the vse of the land, though he may not by the rules of the law enter into the land, and the diuersitie betweene the cases me thinketh to be this. In the first case it appeareth as I haue sayd before in the said xx. Chapter, that the feoffour might lawfully reenter by the law for not payment of rent, & then when he entred accordyng, he by that entrie auoided the first liuery of seisin, in somuch that after the reentrie hee was seised of the Land of like estate as hee was before the feoffement: And so remayneth nothing, whereupon the stranger might ground his vse, but onely the bare graunt or intent of the feoffor: when he gaue the land to the feoffee vpon condition that hee should pay the rent to the straunger, and if not, that it should be lawfull to the stranger to enter: for the feoffement is auoyded by the reentry of the feffor as I haue said before: and as I sayd in the last Chapter, as I suppose a nude or bare graunt of him that is seised of land, is not sufficient to begin an vse vpō. D. A bare grant may change an vse as thou thy selfe agreed in the last chapter, why then may not an vse aswell begin vpon a bare grant? S. When an vse is in Esse, he that hath the vse may of his meere motion giue it away if he will without recompence, as he might the land if he had it in possession,

but I take it for a ground, that he cannot so begin an vse without a liuery of seisin, or vpon a recompence or bargaine, & that there is such a ground in the law, ꝑ it may not so begin it appeareth thus: It hath bin alway holde for law, that if a man make a deed of feoffement to another & deliuer the deed to him as his deed, that in this case he to whom the deed is deliuered, hath no title ne medling with the land afore liuerie of seisin be made to him, but onely that he may enter & occupie the land at the will of the feoffor, & there is no booke saith that the feoffee in that case is seised thereof before liuery to the vse of the feffee. And in likewise if a man make a deed of feffement of 2 acres of land that lye in 2. shires, intending to giue them to the feoffee & maketh liuerie of seisin in the one shire, & not in the other, in this case it is commonly holden in bookes that ꝑ deed is voyd to the acre where no liuerie is made, except it lye within ꝑ view, saue only that he may enter & occupy at wil, as is aforesaid: & there is no boke that saith that the feffee should haue the vse of the other acre, for if an vse passed thereby, then were not the deed void vnto all intents, & yet it appeareth by the words of the deed ꝑ the Feoffor gaue the lands to the feffee, but for lacke of liuery of seisin ꝑ gift was void, & so me thinketh it is here, wout liuery of seisin be made according. But in the 2. case of the said 2. cases the feoffee may not reenter for non-payment of the rent, and so the first liuerie of seisin continueth & standeth in effect, and thereupon the first vse may well begin and take effect in the stranger of the land

when the rent is not paid vnto him according to the first agreement. And so me thinketh that in the first case the vse is determined, because the liuery of seisin, wherupon it commenced is determined, & that in the second case the vse of the land taketh effect in the stranger for not paimēt of ȳ rent, by the grant made at the first liuery, which yet continueth in his effect, & this mée thinketh is the diuersitie betwéen the cases. D. Yet notwithstanding the reason that thou hast made, mee thinke that if a man seised of Lands, make a gift thereof by a nude promise without any liuerie of seisin or recōpence to him made, and grant that hee shall be seised to his vse, that though the promise be voyd in the law, that yet neuertheleſſe it must hold and stand good in conscience and by the law of reason: for one rule of the law of reason is, that we may do nothing against the truth, and sith the trueth is that the owner of the ground hath graunted that he shalbe seised to the vse of the other, that grant must needs stand in effect, or else there is no truth in the grauntor. S. It is not against the trueth of the grauntor in this case, though by the graunt hee be not seised to the vse of the other, but it proueth that he hath graunted that the law will not warrant him to graunt, wherefore his graunt is voyd. But if the grauntor had gone farther and said, that he would also suffer the other to take the profits of the Lands without let or other interruption, or that he would make him estate in the Land when he should bee required, then I think in those cases he were bound in cōscience,

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by that rule of the law of reason that thou hast remembred, to performe them, if he intend to be bounden by his promise, or els he should goe against his owne trueth, and against his owne promise. But yet it shall make no vse in that case, nor he to whom the promise is made shall haue no action in the Law vpon that promise, though it bee not performed, for it is called in the law a Nude or naked promise. And thus me thinketh, that in the first case of the sayd two cases, the grant is now auoided in the law by the reentry of the feoffor, and that the feoffor is not boũden by his grant neither in law nor conscience, but in the second case hee is bound, so that the vse passeth frõ him, as I haue sayd before. D. I hold me content with thy conceit for this time, but I pray thee shew mee somewhat more at large what is taken for a Nude contract, or a naked promise in the Lawes of England, and where an action may lye thereupon, and where not. St. I will with good will say as me thinketh therein.

¶ What is a Nude contract, or naked promise after the Lawes of England, and whether any action may lye thereupon.

Cap. 24.

FIrst it is to be vnderstood, that contracts be grounded vpon a custome of the realm, & by the law that is called Ius gentium, & not directly by the law of reason, for when all things were in common, it needed not to haue contracts,

tracts, but after property was brought in, they were right expedient to al people, so that a mā might haue of his neighbor that he had not of his owne, and that could not hee lawfully but by his gift, by way of lending, concord, or by some lease, bargain, or sale: and such bargains and sales be called contracts, and be made by assent of the parties vpon agreement betweēn them, of goods or lands, for money, or for other recompence, but of mony vsual, for mony vsuall is no contract. Also a concord is properly vpon an agrēement betweene the parties, with diuers articles therein, some rising on ẏ one part, and some on the other, As if J. at Stile letteth a Chamber to Henrie Hart, and it is farther agreed betweene them, that the sayd H. Hart shal goe to board with the said John at Stile, and the said Henry Hart to pay for the Chamber and bording a certaine summe &c. this is properly called a Concord, but it is also a contract, & a good action lyeth vpon it. Howbeit it is not much argued in the Lawes of England what diuersitie is betweene a contract, a concord, a promise, a gift, a lone, or a pledge, a bargain, a couenant, or such other. For the intent of the law is to haue the effect of the matter argued and not the termes. And a nude contract is, where a man maketh a bargaine, or a sale of his goods or lands, without any recompence appointed for it: As if J say to another, J sell thee all my Land, or all my goods, and nothing is assigned that the other shall giue or pay for it, this is a Nude contract, and as J take it, it is void in the law and conscience: and a Nude

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or naked promise is, where a mā promiseth an other to giue him certaine money such a day, or to build an house, or to do him such certain seruice, & nothing is assigned for the money, for the building, not for the seruice: these be called naked promises, because there is nothing assigned why they should be made, and I thinke no action lyeth in those cases though they bee not performed. Also if I promise to another to keepe him such certaine goods safely to such a time, & after I refuse to take them, there lyeth no action against me for it: But if I take thē and after they be lost or impayred through my negligent keeping, there an action lyeth. D. But what opinion hold they that be learned in the law of Englād in such promises that be called naked or nude promises: whether do they hold that they that make the promise, be bounden in cōscience to perform their promise, though they cannot be compelled therto by the law, or not? S. The bookes of the Law of England entreat little thereof, for it is left to the determination of Doctors, & therefore I pray thee shew me somewhat now of thy mind therein, & thē I shall shew thee therin somewhat of the minds of diuers, that be learned in the law of the Realm. Do. To declare the matter plainly after the saying of Doctors, it would aske a long time, and therefore I will touch it briefly, to giue thee occasion to desire to heare more therin hereafter. First thou shalt vnderstād that there is a promise that is called an Vowe, & that is a promise made to God, & he that doth make such a vow vpon a deliberate mind intending to performe

forme it, is bound in conscience to do it, though it be only made in the heart without pronouncing of words, and of other promises made to man upon a certain consideratiō, if the promise be not against the law: as if I promise to give B. xx. l. because he hath made him such a house or hath lent him such a thing, or such other like, I think him bound to keep his promise. But if his promise be so naked, that there is no maner of consideration why it should be made, thē I thinke him not bound to performe it, for it is to suppose that there was some errour in the making of the promise: but if such a promise be made to an Vniuersitie, to a city, to the church, to the Clergie, or to poore men of such a place, & to the honor of God, or such other cause like, as for maintenance of learning, of the common wealth, of the seruice of God, or in relefe of powertie, or such other, then I think that he is boundē in cōscience to perform it, though there bee no consideration of worldly profit, that the graunter hath had or intendeth to haue for it: and in all such promises it must bee vnderstood that hee that made the promise intended to bee bound by his promise, for else commonly after all Doctors hee is not bound, vnlesse hee were bound to it before his promise: As if a mā promise to give his father a gowne that hath need of it, to keepe him from cold, and yet thinketh not to give it him, neuertheless he is bound to give it, for he was bound thereto before. And after some Doctours a man may bee excused of such a promise in conscience by casualtie that commeth after the promise, if it be so, that if hee had

had knowne of the casualtie at the making of the promise hee would not haue made it. And also such promises if they shall bind, they must be honest, lawfull, and possible, and els they are not to be holden in conscience, though there be a cause &c. And if the promise be good and with a cause, though no worldly profit shall grow thereby to him that maketh the promise, but onely a spiritual profit, as in the case before rehearsed of a promise made to an Vniuersity, to a Citie, to the Church, or such other, & with a cause as to the honour of God, there is most commonly holden that an actiō vpon those promises lyeth in the Law Cannon. St. Whether dost thou meane in such promises made to an Vniuersitie, to a citie, or to such other as thou hast rehearsed before, & with a cause, as to the honour of God or such other, that the partie shalbe bound by his promise, if hee intended not to be bounden thereby, ye or nay? Do. I thinke nay, or more than vpon promises made vnto common persons. Stu. And then mee thinketh clerely, that no action can lie against him vpō such promises, for it is secret in his owne conscience, whether he intended for to be bound or nay. And of the intent inward in ȳ heart, mans law cannot iudge, and that is one of the causes why the Law of God is necessarie (that is to say) to iudge inward things, and if an action should lie in ȳ case in ȳ law Cānon, then should the law Cannon iudge vpō ȳ inward intent of the heart, which cannot be as me seemeth. And therfore after diuers ȳ be learned in the lawes of the realme, all promises shalbe taken in this

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manner, that is to say, If hee to whom the promise is made, haue a charge by reason of the promise which he hath also performed: thē in ꝑ case hee shall haue an action for that thing that was promised, though hee that made the promise haue no worldly profit by it. And if a man say to another, heale such a poore man of his disease, or make an high way, and I shall giue thee thus much, and if he do it, I think an action lyeth at the common Law. And moreouer though the thing that he shall do be all spirituall, yet if he performe it, I thinke an action lyeth at the common Law. As if a man say to an other, fast for me all the next Lent, and I shall giue thee xx. pounds, and hee performeth it, I thinke an action lyeth at the Common Law. And in likewise if a man say to another, marry my daughter and I will giue thee 20. pounds, vpon this promise an action lyeth, if hee marry his daughter: And in this case hee cannot discharge the promise though hee thought not to bee bound thereby, for it is a good contract, and hee may haue Quid pro quo, that is to say, the preferment of his daughter for his mony. But in those promises made to an Vniuersitie, or such other as thou hast remembred before, with such causes as thou hast shewed, that is to say, to the honour of God, or to the increase of learning, or such other like, where the partie to whom the promise was made is bound to no new charge, by reason of the promise made to him, but as hee was bound to before, there they thinke that no Action lyeth against him, though hee performe not

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his promise, for it is no contract, & so his own conscience must be his iudge whether he intended to bee bound by his promise or not. And if he intended it not, then he offended for his dissimulation only, but if he intended to be bound, then if he perform it not, vntruth is in him, and he proueth himselfe to bee a lyer, which is prohibited aswel by the law of God, as by the law of reason: And furthermore, many ꝑ be learned in the Law of England hold, that a man is as much bounden in conscience by a promise made to a common person, if he intended to be bound by his promise, as he is in the other cases that thou hast remembred of a promise made to the Church, or the Clergie, or such other: for they say that almuch vntrueth is in the breaking of the one as of the other, & they say that the vntruth is more to bee pondred than the person to whom ꝯ promises be made. D. But what hold they if the promise be made for a thing past, as I promise thee xl. l. for that thou hast builded me such a house, lyeth an action there? S. They suppose nay, but he shall be bound in conscience to perform it after his intent, as is before said. Do. And if a man promise to giue another xl. li. in recompence for such a trespas that hee hath done him, lyeth an action there? St. I suppose nay, & the cause is for that such promises be no perfect contracts: for a contract is properly where a man for his mony shall haue by assent of the other party certaine goods or some other profit at the time of ꝯ contract or after: but if ꝯ thing bee promised for a cause ꝯ is past by way of a recõpence, then it is rather an accord thã a con=

contract, but then the Law is, that vpon such accord the thing that is promised in recompẽce must be paid, or deliuered in hand, for vpon an accord there lyeth no action. D. But in the case of trespasse, whether hold they that hee be boũd by his promise, though hee intended not to bee bound thereby. S. They think nay, no more thã in the other cases that be put before. D. In the other cases he was not bound to that he promised, but onely by his promise, but in this case of trespas, hee was bound in conscience before the promise to make recompence for the trespasse: and therfore it seemeth, that he is bound in conscience to kẽpe his promise, thou hee entended not to be bound thereby.

St. Though he were bound before the promise to make recompẽce for his trespas, yet hee was not bound to no summe in certaine but by his promise: and because that the summe may bee too much, or too little, and not egall to the trespas, and that the partie to whom the trespas was done notwithstanding the promise is at liberte to take his action of trespasse if hee will, therefore they hold that hee may bee his owne Iudge in conscience, whether he entended to bee bound by his promise or not, as hee may in other cases, but if it were of a debt, then they hold that he is bound to performe his promise in conscience. Doct. What if in the case of Trespasse hee affirmeth his promise with an oath. St. Then they hold that hee is bound to performe it for sauing of his oath, though hee entended not to bee bound, but if hee entended to be bound by his promise, then they say, that

an oath nædeth not but to enforce the promise for they say, hee breaketh the Law of reason, which is, that we may doe nothing against the truth, aswell whē he breaketh his promise that he thought in his own heart to be bound by, as he doth when hee breaketh his oath, though the offence bee not so great by reason of the periurie. Moreouer to that thou sayest that vpon such promises as thou hast rehearsed before, shall lye an action after the law Cannon, verily as to that in this realme there can no action lye thereon in the spirituall court, if the promise be of a temporall thing, for a Prohibitiō, or a Præmunire facias should ly in that case. D. That is maruell sith there can no action lie thereon in the Kings court as thou saist thy selfe. S. That maketh no matter, for though there lie no action in the Kings court, against executors vpon a simple contract, yet if they bee sued in that case for the debt in the Spirituall court, a prohibition lyeth. And in likewise if a man wage his Law vntruely in an action of debt vpon a contract in the Kings Court, yet hee shall not be sued for the periurie in the Spirituall court, and yet no remedie lyeth for the periurie in the Kings Court: for the Prohibition lyeth not onely, where a man is sued in the Spirituall Court of such things, as the partie may haue his remedie in the kings court, but also where the Spiritual Court holdeth plee in such case, where they by the Kings prerogatiue, and by the auntient custome of the realme ought none to hold. Doct. I will take aduisement vpon that thou hast said in this matter, till another time,

time, and I pray thee now proceed to another question.

¶ The 20. question of the Student.

Cap. 25.

A Man hath two sons, one borne before espousels, & the other after espousels, & the father by his will bequeatheth to his son & heire all his goods, which of these two sonns shal haue the goods in conscience? D. As I said in our first dialogne in latin, the last Chap. the doubt of this case dependeth not in the knowing what conscience will in this case, but rather the knowing which of the sonnes shall bee iudged heire (that is to say) whether he shall be taken for heire that is heire by the Spirituall Law, or hee that is heyre by the Law of the Realme, or else that it shall bee iudged for him that the father take for heire? St. As to that point, admit the Fathers mind not to bee knowen, or els that his mind was ỳ hee should bee taken for heir, that should be iudged for heir by the law, that in this case it ought to bee iudged by. And then I pray thee shew mee thy minde therein, for though the question be not directly depending vpon the point to see what conscience will in this case, yet it is right expedient for the well ordering of conscience, that it bee knowen after what law it shall bee iudged: for if it ought to be iudged after the temporall law who would be heire, thē it were against cōscience, if the iudges in the spirituall Law should

Judge him for heire that is heire by the spirituall Law, and I thinke they should bee bound to restitution thereby, and therefore I pray thee shew mee thine opinion, after what Law it shall be iudged. D. Mee thinketh that in this case it shalbe iudged after the law of ȳ church, for it appeareth that the bequest is of goods, and therefore if any suit shalbe taken vpon the execution of the will for the bequest, it must bee taken in the Spirituall Court, and when it is depending in the Spirituall court, me thinketh it must be iudged after the spirituall law: for of the Temporall law they haue no knowledge, nor they are not bound to know it as mee thinketh, and more stronger not to Judge after it. But if the bequest had been of a chattell reall, as of a lease for terme of yeares, or of a ward, or such other, then the matter should haue come in debate in the Kings Court, and then I thinke the Judges there should indge after the Law of the Realme, and that is, that the ponger brother is heire: and so me thinketh the diuersitie of the Courts shall make the diuersitie of iudgement. St. Of that might follow a great inconuenience as me seemeth, for it might be such a case that both chattels real, and chattels personall were in the will, & thē after thine opinion, the one sonne should haue the chattels personall, and the other sonne the chattels reall, and it cannot be conueniently taken as me thinketh, but that the fathers will was, that the one sonne should haue all, and not bee diuided. Therefore me thinketh that he shalbe iudged for heire that is heire by the common law:

and

and that the Iudges spirituall in this case bee bound to take notice what the common law is, for sith the things that be in variance be temporall, that is to say, the goods of the father, it is reason that the right of them in this realme shall be determined by the law of the Realme.

D. How may that be? for the Iudges spirituall know not the law of the Realme, ne they cannot know it as to the most part of it, for much part of the law is in such speech that few men haue knowledge of it, & there is no meanes ne familiaritie of studie betwéen them that learne the sayd Lawes: for they be learned in seuerall places and after diuers wayes, & after diuers maners of teachings, and in diuers speeches, & commonly the one of them haue none of the Bookes of the other, and to bind the spirituall Iudges to giue Iudgement after the law that they know not, ne that they cannot come to the knowledge of it, séemeth not reasonable. Stu. They must doe therein as the Kings Iudges must doe, when any matter commeth before thē that ought to bee iudged after the spirituall Law, whereof I put diuers cases in our first Dialogue in English the viij. Chapter, that is to say, they must either take knowledge of it by their owne study or els they must enquire of thē that be learned in the law of the Church, what the law is, and in likewise must they doe. But it is to doubt, that some of them would be loath to aske any such question in such case, or to confesse that they are bound to giue their iudgment after the temporall Law, and surely they may lightly offend their conscience.

D. I suppose that some be of opinion that they are not bound to know the law of the realme, & verily to my remembrance I haue not heard that Iudges of the spiritual law are bound to know the law of the realme.

St. And I suppose that they are not onely bound to know the Law of the Realme, or to do that in them is to know it, when the knowledge of it openeth the right of the matter that dependeth before them, but that they bee also bound to know where and in what case they ought to Iudge after it: for in such cases they must take the Kings Law as the Law spiritual to that point, & are bound in conscience to follow it as it may appeare by diuers cases, whereof one is this. Two Iointenants be of goods, and the one of them by his last will bequeatheth all his part to a straunger and maketh the other Iointenant his Executor & dyeth, if he to whom the bequest is made, sue the other iointenant, vpon the legacie as executor &c. vpon this matter shewed, the Iudges of the Spirituall Law are bound to iudge the will to be void, because it is void by the Law of the realme, whereby the iointenant hath right to the whole goods by the title of the Suruiuour, and is iudged to haue the goods as by the first gift which is before the title of the will, and must therefore haue preferment as the eldest title, and if the Iudges of the Spirituall Court iudge otherwise, they are bound to restitution: and by like reason the Executours of a man that is Outlawed at the time of his death may discharge themselues in the

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Spiritual court of the performing of legacies, because they be chargeable to the king, and yet there is no such law of vsagary in the Spirituall Law.

D. By occasion of that thou hast said before I would aske of thee this question. If a Parson of a Church alien a portion of Dismes according as the Spirituall law hath ordayned, is not that alienation sufficient, though it haue not the solemnities of the Temporall Law? St. I am in doubt therein if the portion be vnder the fourth part of the value of the Church: but if it be to the value of the fourth part of the Church, or aboue, it is not sufficient, and therfore was the writ of right of dismes ordained: and if in a writ of right of Dismes it be iudged in the kings Court for the patron of the successor of him that alieneth, because the alienation was not made according to the common law, then the Iudges of the spirituall law are bound to giue their iudgement according to the iudgement giuen in the Kings Court. And in likewise if a parson of a Church agree to take a pension for the tithe of a Mill, if the pension be to the fourth part of the value of the Church or aboue, then it must be aliened after the solemnities of the kings Lawes, as lands and tenements must, or else the patron of the successor of him that alieneth, may bring a writ of right of Dismes, and recouer in the kings court, & then the Iudges of the spirituall court are bound to giue iudgement in the Spirituall Courts accordingly, as is aforesaid. Doct. I haue heard say, that a writ of right of dismes is

giuen by the statute of West. 2. and that speaketh onely of dismes, & not of pensiõs. S. where a Parson of a Church is wrongfully deposed of his dismes, and is let by an Indicauit to aske his Dismes in the Spiritual Court, then the patron may haue a writ of Right of Dismes by the statute that thou speakest of, for there lay none at the Common Law, for the Parson had there good right, though he were let by the Indicauit to sue for his right. But whē ꝯ Parson had no remedy at the Spirituall law, there a Writ of Right of Dismes lay for the Patron by the common law, aswell of pensiõs as of Dismes, and some say that in such case it lay of lesse than of the fourth part by the common Law, but that I passe ouer. And the reason why it lay at the common Law, if the Dismes or pentions were aboue the fourth part as was this: by the spirituall law the alienation of the parson with ꝯ assent of the Bishop and of the Chapter shall barre the successour without assent of the patron, and so the patron might lose his patronage and he not assenting thereto: for his encumbent might haue no remedy but in the Spiritual court, and there he was barred, wherefore the patron in that case shal haue his remedy by ꝯ common law where the assent of the Ordinary and Chapter without the Patron shall not serue, as it is sayd before. But where the encumbent had good right by the Spirituall Law, there lay no remedie for the Patron by the Common Law, though the incumbent were let by an Indicauit, & for that cause was the said Statute made, and it

lieth

ipeth aſwel by the equity for offrings and penſions, as for Diſmes. Then further I would thinke that where the Spirituall Court may hold plee of a temporall thing, that they muſt iudge after the temporall Law, and that ignorance ſhall not excuſe them in that caſe: for by taking of their office they haue bound themſelues to haue knowledge of aſmuch as belongeth to their office, as all Iudges be, ſpirituall, or temporall. But if it were in argument in this caſe, whether the eldeſt ſonne might be a Prieſt becauſe he is a baſtard in the temporall Law, that ſhould be iudged after the ſpirituall Law, for the matter is ſpirituall. Do. Yet notwithſtanding all the reaſons that thou haſt made, I cannot ſee how the Iudges of the ſpirituall Law, ſhall be compelled to take notice of the temporal Law, ſeeing that the moſt part of it is in the French Tongue, for it were hard that euerie Spirituall Iudge ſhould be compelled to learne the tongue. But if the law of the Realme were ſet in ſuch order that they that intend to ſtudie the Law Cannon, might firſt haue a ſight of the law of the Realme, as they haue now of the Law Ciuill, and that ſome Workes and treatiſes were made of caſes of conſcience concerning theſe two Lawes, as there be now concerning the law Ciuill & the law Cãnon, I would aſſent that it were right expedient, and then reaſon might ſerue the better, that they ſhould be compelled to take notice of the Law of the Realme, as they be now bound in ſuch Countries as the law Ciuill is vſed to take notice of that Law.

St.

St. Mæ thinketh thine opinion is right good and reasonable, but till such an order be taken, they are bound, as I suppose, to inquire of thē that be learned in the common Law, what the Law is, and so to giue their iudgement accordīng, if they will kæp themselues from offence of conscience. And forasmuch as thou hast wel satisfied my mind in all these questions before, I pray thæ now that I may somewhat feele thy mind in diuers articles that be written in diuers bookes for the ordering of conscience vpon the Law Cannon and Ciuill: for mæ thinketh, that there be diuers conclusions put in diuers bookes, as in the Summes called summa Angelica, and summa Rosella, & diuers other, for the good order of conscience, that be against the law of this realme, and rather blind conscience, than do giue any light vnto it.

D. I pray thæ shew me some of those cases: Stu. I will with good will.

¶ Whether an Abbot may with conscięce present to an Aduowson of a Church that belongeth to the house without assent of the Couent.

Cap. 26.

IT appeareth in the Chapter, Et agnoscitur de his quæ fiunt a Prælatis, the which Chapter is recited in the sum called summa Angelica, in the title Abbas, the xxvij. article, that he may not without any custom, or any speciall priui-

priuiledge to helpe therein. Sr. Truth it is, that there is such a decretall, but they that be learned in the law of England, hold the decretall bindeth not in this Realm, & this is the cause why they doe hold that opinion: By the Law of the realm the whole disposition of the lands & goods of the Abbey is the Abbots onely for the time that he is Abbot, and not in the Couent: for they be but as dead persons in the Law, and therefore the Abbot shall sue and be sued onely without the Couent, doe homage, fealtie, atturne, make leases, and present to aduowsons onely in his owne name, and they say further, that this authoritie cannot bee taken from him, but by the Law of the realme, and so they say, that the makers of the decretall exceeded their power: wherefore they say it is not to be holden in conscience, no more than if a decree were made that a lease for terme of yeares or at will made by the Abbot without the couent should be immediatly void, & so they thinke that the Abbot may in this case present in his own name without offence of cõscience, because the said decretall holdeth not in this Realme. Do. But many be of opinion, that no man hath authoritie to present in right and conscience to any benefice with Cure but the Pope, or that hee hath his authoritie therein deriued from the Pope: for they say that forasmuch as the Pope is the Vicar generall vnder God, & hath the charge of the soules of all people that be in the flock of Christs Church, it is reason that sith hee cannot minister to all, ne doe that is necessarie to all people for their

soules

soules health in his owne person, that he shall assigne deputies for his discharge in that behalfe. And because Patrons claime to present to Churches in this Realme by their owne right, without Title derived from the Pope, they say that they vsurpe vpon the Popes authoritie: & therefore they conclude that though the Abbot haue title by the law of the Realme to present in this case in his owne name, that yet because that title is against the Popes prerogatiue, that that title, ne yet the Law of the Realme that maintayneth that title, holdeth not in conscience. And they say also that it belongeth to the law Cannon to determine the right of presentmēt to benefices, for it is a thing spirituall and belongeth to the spirituall iurisdiction, as the depriuation from a benefice doth, and so they say the said decretall bindeth in conscience, though in the law of the Realme it bindeth not. St. As to the first consideration I would right well agree, that if the patrons of Churches in this Realme claimed to put incumbents into such Churches as should fal voyd of their Patronage without presenting them to the Bishop, or if they claimed that the Bishop should admit such incumbent as they should present without any examination to be made of his abilitie in that behalfe, that that claime were against reason and conscience, for the cause that thou hast rehearsed: But forasmuch as the Patrons in this Realme claime no more but to present their Incumbents to the Bishop, and then the Bishop to examine the abilitie of the incumbent, and if he find him

by

by the Examination not able to haue cure of soules, he then to refuse him, and the patron to present another that shalbe able, and if hee be able, then the Bishop to admit him, institute him, & induct him, I thinke that this claime, & their presentments thereupon stand with good reason and conscience. And as to the second consideration, it is holden in the Lawes of the Realme, that the right of presentment to a Church, is a temporall inheritance, & shall discend by course of inheritance from heire to heir as lands & tenements shall, & shalbe take̅ as an assets as lands and tenements be: and for the triall of the right of patronages bee ordeined in the law diuers actions for them y be wronged in that behalfe, as writs of right of Aduowson, Assises of Darrein presentment, Quare impedit, & diuers other which alway without time of mind haue bin pleaded in the Kings courts, as things pertaining to his Crowne and royall dignitie: and therefore they say that in this case his lawes ought to bee obeyed in law and conscience. D. If it come in variance whether hee that is so presented be able or not able, by whom shall the abilitie be tried? S. If the ordinary bee not partie to the action, it shall be tryed by the Ordinarie and if he be partie it shall be tried by the Metropolitan. Doct. Then the Law is more reasonable in that point than I thought it had bene: but in the other point I will take aduisement in it till another time, and I pray thee shew mee thy mind in this point: If an Abbot name his couent with him in his presentation, doth that make the presentation

void

void in the law, or is the presentation good that notwithstanding?

Stu. I think it is not void therefore, but the naming of them is void, and a thing more than needeth. For if the Abbot be disturbed, he must bring his action in his owne name without the couent. D. Then I perceiue well that it is not prohibited by the Law of England, but that the Abbot may name the couent in his presentation with him, and also take their assent whom hee shall present if hee will: and then I hold it the surest way, that hee so doe, for in so doing hee shall not offend neither in Law, nor conscience. St. To take the assent of the couent whom he shall present, and to name them also in the presentation, knowing that hee may doe otherwise, both in Law and Conscience if hee will, is no offence: but if he take their assent, or name thē with him in the presentation, thinking that he is so bound to do in law and conscience, setting a conscience where none is, and regardeth not the Law of the Realme, that will discharge his conscience in this behalfe, if hee will, so that he present an able man as hee may do without their assent, there is an errour, and offence of conscience in the Abbot. And in likewise if the Abbot present in his owne name, and therefore the Couent saieth that hee offendeth in conscience, in that he obserueth not the law of the Church, for that he taketh not their assent, then they offend in iudging him to offend that offendeth not. And therefore the sure way is in this case to iudge both the said laws of such effect as they bee, & not to set an offence

of

of conſcience by breaking of the ſayd decree, which ſtãdeth not in effect in this behalf within this Realme.

¶ If a man find beaſts in his ground doing hurt, whether may hee by his owne authoritie, take them & keepe them till he be ſatisfied for the hurt,

Cap. 27.

THis queſtion is made in the Sum called ſumma Roſella, in the title of reſtitution, that is to ſay, Reſtitutio 13. the 9. Article, and there it is anſwered, that hee may not take them for to hold them as a pledge till he bee ſatisfied for the hurt: but that hee may take them and keepe them till he know who oweth them, that hee may thereby learne againſt whom to haue his remedie. Is not the law of the realme ſo in likewiſe? St. No verily, for by the Law of the Realme, hee that in that caſe hath the hurt, may take the beaſts as a Diſtres, & put them in a pound Ouert, ſo it bee within the ſame Shire, and there let them remaine till ỹ owner will make him amends for the hurt. Do. What calleſt thou a pound Ouert. Stu. A pound Ouert is not onely ſuch a pound as is commonly made in Townes and Lordſhips, for to put in beaſts that bee diſtrained, but it is alſo euery place where they may bee in lawfully, not making the owner an offendour for their beeing there: And that it bee there alſo, that the owner

owner may lawfully giue the beasts meate and drinke while they be in pound.

D. And if they die in pound for lacke of meate whose iopardy is it? St. If it bee such a pound Quetr as I speake of, it is at the peril of him that oweth the beasts, so that hee that had the hurt shall be at liberty to take his action for the trespasse if hee will: and if it bee not a lawfull pound, thē it is at the peril of him that distrained, and so it is if he driue them out of the shire and they die there.

D. I put case that he that oweth the beasts, offer sufficient amends, and the other will not take it, but keepeth the beasts still in pound, may not the owner take them out? St. No, for he may not be his owne iudge, and if he do, an action lyeth against him for breaking of the pound: but he must sue a Replevin to haue his beasts deliuered him out of the pound, and thereupon it shall bee tried by 12. men, whether the amends that was offered were sufficient or not, and if it be found that the offer was not sufficient, then he that hath the hurt shall haue such amends as the 12. men shall assesse. Do. If it bee found by the 12. men, that the amends were sufficient, shall he that refuseth to take it, haue no punishment for his refusall, and for keeping of the beasts in pound after that time? St. I thinke no, but that hee shal pay damages in the Replevin, because the issue is tried against him.

D. I put case that the beasts after the refusall dye in pound for lack of meat, at whose iopardie is it then? Stu. At the iopardie of him that owed

owed the beasts, as it was before: for hee is bound at his perill by reason of the wrong that was done at the beginning, to see that they haue meat as long as they shalbe in pound, vnlesse the Kings writ come to deliuer them, & he resisteth it: for after that time it will bee at his leopardie if they die for lacke of meat, & the damages shall bee recouered in an action brought vpon the Statute for disobeying the Kings writ.

¶ Whether a gift made by one vnder the age of xxv. yeares be good.

Cap. 28.

IT appeareth in Summa Angelica in the title donatio prima the 7. article, that a mā before the age of 25. yeres may not giue, without it be with the authoritie of his tutor: Is it not so likewise at the common Law? S. The age of infants to giue, or sell their lands and goods in the Law of England is at 21. yere, or aboue, so that after that age the gift is good, and before that age it is not good, by whose assent soeuer it be, except it be for his meat, & his drink, or apparell, or that he doe it as executor, in performance of the will of his testatour, or in some other like cases, that needeth not to be rehearsed here: & that age must be obserued in this realm in law & conscience, & not þ said age of 25. yere. Do. I put case, it were ordeined by a decree of the Church, that if any man by his will bequeathed goods to another, and willeth þ they

shalbe deliuered to him at his full age, & that in that case 25. peres shalbe taken for the full age, shall not that decree bee obserued & stand good after the law of England? S. I suppose it shall not, for though it belong to the Church to haue the probate and the execution of Testaments made of goods & chattels, except it be in certain Lordships & seignories that haue thē by prescription, yet the church may not as me seemeth determine what shal be the lawfull age for any person to haue the goods, for that belongeth to the king & his lawes to determine: & therfore if it were ordained by a statute of the realme, ỳ hee should not in such a case haue the goods till he were of the age of 25. peres, that statut were good & to be obserued aswel in the spiritual law as in the law of the Realme, & if a statute were good in that case, then a decree made thereof is not to be obserued, for the ordring of ỳ age may not be vnder two seuerall powers, and one property of euery good law of mans, that the maker excēd not his authoritie: and I think that the spirituall iudge in that case ought to iudge the full age after the law of the Realme, seeing that the matter of the age concerneth tēporal goods: and I suppose farther that as the king by authoritie of his Parliament may ordaine that all wils shalbe void, & that the goods of euerie man shalbe disposed, in such maner as by statute should bee assigned, that more stronger he may appoint at what age such wils as bee made shalbe performed. D. Thinketh then that the King may take away the power of the Ordinary, that he shall not call executors to ac-

compt?

compt? Sr. I am somwhat in doubt therein, but it seemeth that if it might be enacted by statute, that all wils should bee void, as is alredy said, & then it might bee enacted, that no man should haue authorie, to call none to accompt vpon such wils, but such as the statute shall therein appoint, for he y may doe the more, may doe the lesse: notwithstanding I will nothing speake determinatly in that point at this time, nr I meane not, that it were good to make a statute that all wils should be void, for I thinke them right expedient, but mine intent is, to proue y the common law may ordaine the time of the full age, aswell in wils of temporal things as other wils, and also that wils shalbe made. And if it may so do, then much stronger it belongeth to the kings lawes to interpret wils concerning temporall things, aswell when they come in argument before his Iudges, as whē they com in argument before spirituall Iudges, & that they ought not to bee iudged by seuerall lawes (that is to say) by the spirituall Iudges in one maner, & by the kings Iudges in another maner.

¶ If a man be conuict of heresie before the Ordinarie, whether his goods be forfeited.

Cap. 29.

IT appeareth in Sūma Angelica in y title Donatio prima the 12. article, that hee that is an heretick may not make Executors, for in the

law his goods be forfeit: what is the law of the realm therin? St. If a man be conuict of hereſie and abiure, hee hath forfeit no goods, but if hee be conuict of hereſie, & be deliuered to lay mens hands, then hath he forfeit al his goods that he hath at that time that he is deliuered to them, though he be not put in execution for the hereſie: but his lands he ſhall not forfeit, except he be dead for the hereſie, & then he ſhal forfeit thē to the lords of ꝑ fee, as in caſe of felony, except they bee holden of the Ordinarie, for then the King ſhall haue the forfeiture, as it appeareth by a ſtatut made the ſecond yere of H.5. Cap 7. D. Mee thinketh that as it belongeth onely to the Church to determine hereſies, that ſo it belongeth to the Church, to determine what puniſhment hee ſhall haue for his hereſie, except death, which they may not be iudges in: but if the Church decree, that he ſhall therefore forfeit his goods, mee thinketh that they bee forfeit by that decree? St. Nay verely, for they bee temporall, and belong to the iudgement of the Kings Court, and I think the Ordinary might haue ſet no fine vpon one impeached of hereſie, till it was ordeined by the Statute of H.4. that hee may ſet a fine in that caſe if he ſee cauſe, & then the king ſhall haue that fine, as in the ſaid ſtatute appeareth.

¶ Where diuers patrons of an Aduowſon, and the Church voideth, the patrons vary in their preſentments, whether the Biſhop ſhall haue libertie to preſent which of the incumbents that he will, or not.

Cap.

Cap. 30.

This question is asked in Sūma Rosella, in the title Patronus the 9. Article, & there it appeareth by the better opinion, ỹ he may present whether clark he will, howbeit ỹ maker of the said sum, saith by the rigor of the law, the Bishop in such case may present a strāger, because the patrons agrē not: & in ỹ same chap. Patronus the 15. article, it is said, ỹ hē must be preferred that hath the most merits & hath the most part of the patrons: and if the number be egal, that thē it is to consider the merits of the patron, and if they be of like merit, thē may the Bishop command them to agrē and to present again. And if they cannot yet agrē, then the liberty to present is giuen to the Bishop to take which he will: & if he may not yet present without great trouble, then shal the bishop order the Church in the best maner he can: & if he cānot order it, then shall he suspend the church, & take awāy the relicks to the rebukes of the patrōs: and if they will not so be ordered, then must he aske help of the temporalty: And in the 15. article of the said title Patronus, it is asked, whether it be expedient in such case, that the more part of the patrons agrē, hauing respect to all the patrons, or that it suffice to haue the more part in comparison of the lesse part, as thus, There be foure patrons to present one clarke: the first and second present one, the third presenteth another, and the fourth another, hee this is presented by 2. hath not ỹ more part in comparison of all the patrons, for they be egall, but hee hath the more part hauing respect to

the other presentments: to this question it is answered, that either the presentment is made of thē that be of the colledge, & there is requisit the more part hauing respect to al the colledge, or els euery mā presenteth for himself, as commonly do lay mē ꝑ haue the patronage of their patrimonie, & then it sufficeth to haue the more part in respect of the other parties, doth not the law of England agree to these diuersities? St. No verily. D. What order then shalbe taken in the law of Englād, if the patrōs vary in their presentments? S. After the lawes of England this order shalbe taken: If they be iointenāts, or tenāts in cōmon of ꝑ patronage, & they vary in presentment, the Ordinary is not bound to admit none of their clerks, neither ꝑ more part nor the lesse, & if the 6. moneths passe or they agree, then he may present by the laps, but he may not present within ꝑ 6. moneths, for if he do, they may agree and bring a Quare imp. against him, & remoue his clerke, & so the ordinary shall be a disturber: and if the patrons haue the patronage by discent as coparceners, then is the Ordinary boūd to admit the clerk of the eldest sister, for the eldest shall haue the preferment in the law, if she wil, & then at the next auoidance the next sister shall present, and so by turne one sister after another, till all the sisters or their heires haue presented, & thē the eldest sister shal begin again: and this is called a presenting by turne, & it holdeth alway betwēn coparceners of an aduowsō, except they agree to present together, or that they agree by cōposition to present in some other maner, and if they doe so, the

agree-

agrément must stand: but this must be alwaye except, that if at the first auoidance that shalbe after the death of the common ancester, ꝑ King haue the ward of the youngest daughter, ꝑ thē the king by his prerogatiue shall haue the presentment, and at the next auoidance the eldest sister, and so by turne. But it is to vnderstand that if after the death of the cōmon ancester the Church voideth, and the eldest sister presented together with another of the sisters, & the other sisters euerie one in their owne name or together, that in ꝑ case the Ordinary is not bound to receiue none of their Clerks, but may suffer the church to run into the laps, as it is said before: for he shal not be bound to receiue ꝑ clerk of the eldest sister, but where shee presenteth in her own name. And in this case where the patrons varie in presentment, the Church is not properly sayd Litigious, so that the Ordinary should be bound at his perill to direct a writ to inquire de iure patronatus: for that writ lyeth where 2. present by seuerall titles, but these patrons present all in one title, & therfore the Ordinarie may suffer it to passe, if he will into the laps: and this manet of presentments must be obserued in this realme in law and conscience.

¶ How long time the patron shall haue to present to a benefice.

Cap. 31.

This question is asked in Summa Angelica in the title Ius patronatus the 16. Article, & there it is answered, that if ꝑ patrō be a lay man that he shall haue 4. moneths, and if he be a

Clarke, he shal haue 6. moneths. S. And by the common law he shal haue 6. moneths whether he be a lay man or a clarke, and I see no reason why a clark should haue more respit than a lay man, but rather the contrary. D. From what time shal ꝑ 6. moneths be accompted? S. That is in diuers maners after the maner of the voidance, for if the church void by death, creation, or cession, the 6. moneths shall be counted from the death of the encumbent, or from the creation, or cession, whereof the patron shall be compelled to take notice at his perill: & if the voidance be by resignation or depriuation, thē the 6. moneths shall begin when the patron hath knowledge giuen him by the bishop of the resignation or depriuation. D. What if he haue knowledge of the resignation or depriuation, and not by the Bishop, but by some other, shall not the sixe moneths begin then from the time of that knowledge? S. I suppose that it shall not begin til he haue knowledge giuen him by the Bishop. D. An vnion is also a cause of voidance, how shall the 6. moneths be reckoned there? S. There can no vnion be made but the patrons must haue knowledge, and it must be appointed who shall present after that vnion, ꝑ is to say, one of them or both, either iointly or by turne one after another, as the agreement is vpon the vnion, and sith the patron is priuie to the auoidance, and is not ignorant of it, the 6. moneths shall be accompted from the agreement. Doct. I see well by the reason that thou hast made in this Chapter, ꝑ ignorance sometime excuseth in the Law of England, for in some

some of the sayd auoydances it shall excuse the patrons, as it appeareth by the reasons aboue, and in some it shall not: wherfore I pray thee shew me somewhat where ignorance excuseth in the Law of England, and where not after thine opinion. St. I will with good will hereafter doe as thou sayest if thou put mée in remembrance thereof. But I would yet moue thée somewhat further in such questions as I haue moued thée before, concerning the diuersities betwéen the lawes of England and other lawes: for there be many moe cases therof, that as mée séemeth haue right great néed, for the good order of conscience of many persons, to be reformed, and to be brought into one opinion both among spiritual and temporall: as it is in the case where Doctors hold opinion, that the statute of lay men that restraine liberty to giue lands to the Church should be voyd, & they say farther, that if it were prohibit by a statut that no gift should be made to forreines that yet a gift made to the church should be good, for they say, that the inferiour may not take away the authoritie of the superiour, & this saying is directly against the statutes, whereby it is prohibit, that lands should not be giuen into Mortmain: & they say also that bequests & gifts to ꝑ church must be determined after the law Cānon, & not after the lawes & statuts of lay men, and so they regard much to whom the gift is made, whether to the Church, or to make causwais, or to cōmon persons, & beare more fauor in gifts to the Church than to other: and the law of the Realme beholdeth the thing that is giuen

giuen and pretended, that if the thing that is giuen be of lands or goods, that the determination thereof, of right belongeth in this realme to the kings lawes, whether it be to spirituall men or temporall, to the church, or to other, and so is great diuision in this behalf, whē one preferreth his opinion, and another his, & one this iurisdiction, & another that, and that as it is to feare more of singularity thā of charity: wherfore it semeth, that they that haue the greatest charge ouer the people, specially to ꝑ health of their soules, are most bound in cōscience before other to loke to this matter, & to do that in thē is in all charity to haue it reformed, not beholding the temporal iurisdiction nor spiritual iurisdiction, but the common wealth, & quietnesse of the people: & that vndoubtedly would shortly follow, if this diuision were put away, which I suppose verily wil not be, but ꝑ al men within the realme both spirituall & temporall bē ordred & ruled by one law, as to tēporall things: Notwithstanding forasmuch as the purpose of this writing is not to treat of this matter, therfore I wil no farther speake therof at this time. D. Then I pray thee proceed to an other question, that thou sayest thy mind is to do. S. I will with good will.

¶ If a man be excommenged, whether he may in any case be assoiled without making satisfaction.

Cap. 32.

In the summe called Summa Rosella, in the title Absolutio quarta, the second article, it is sayd

ſaid, that he that is excommunicat for a wrong if hee bee able to make ſatisfaction, ought not to be abſoiled but he doe ſatiſfie, & that they offend that do abſoile him, but yet neuertheles he is abſoyled, & if he be not able to make amends, that he muſt yet be abſoyled, taking a ſufficient gage to ſatiſfie if he be able hereafter, or elſe that he make another to ſatiſfie if he be able. And theſe ſayings in many things hold not in the Lawes of England. D. I pray thee ſhew me, wherein the law of the realme varieth therefrom. St. If a man be excommunicat in the ſpirituall court for debt, treſpas, or ſuch other things as belõg to the kings crowne, and to his royall dignity, there hee ought to be abſoyled without making any ſatisfaction, for the Spiritual court exceedeth their power in that they held plee in thoſe caſes, & the party if he will may therupon haue a Premunire facias, aſwell againſt the partie that ſued him, as againſt the Judge: & therfore in this caſe they ought in conſcience to make abſolution without any ſatisfactiõ, for they not onely offended the partie in calling him to anſwer before them of ſuch things as belong to the law of the Realme, but alſo the king: for he by reaſon of ſuch ſuites, may leſe great aduantages, by ꝑ reaſon of the writs originals, iudicials, fines, amerciaments, & ſuch other things as might grow to him if ſuits had bin takẽ in his courts according to his lawes: & according to this ſaying it appeareth in diuers ſtatutes, that if a man lay violent hands vpon a clerke, and beat him, that for the beating amends ſhal be made in the kings court, and for the laying

of

of violent hands vpon the Clark, amends shal be made in the Court christian. And therfore if the Iudge in the court christian would award the partie to yeeld damages for the beating, he did against the statute. But admit that a man be excommenged for a thing that the spirituall Court may award the party to make satisfaction of, as for the not inclosing of the Church yard, or for not apparelling of the church conuenientlye: Then I think the party must make restitution, or lay a sufficient caution if he be able or he be assoiled: but if ỹ party offer sufficient amends, and haue his absolution, and the Iudge will not make him his letters of absolution, if the excommengement be of Record in the Kings Court, then the king may write vnto the spirituall Iudge, commaunding him that he make the party his Letters of absolution vpon paine of contempt: & if the sayd excommunication be not of Record in the Kings Court, then the party may in such case haue his action against the Iudge spiritual, for that he would not make him his Letters of absolution: but if he be not assoiled, or if he be not able to make satisfaction, and therefore the Iudge spirituall will not assoile him, what the Kings Lawes may do in this case I am somwhat in doubt, & will not much speake of it at this time, but as I suppose, he may aswell haue his actiõ in that case for the not assoiling him, as where he is assoiled, & that the Iudge will not make him his Letters of absolution: and I suppose the same law to be where a mã is accursed for a thing that ỹ Iudge had no power to accurse

him

him in, as for Debt, Treſpaſſe, or ſuch other. Do. There he may haue other remedies, as a Præmunire facias, or ſuch other, and therfore I ſuppoſe the other action lyeth not for him.

St. The Iudge and the partie may be dead, & then no Præmunire lyeth, & though they were aliue, and were condemned in Præmunire, yet that ſhould not auoide the excommengement: & therefore I thinke the action lyeth, ſpecially if he be thereby delayed of actions that hee might haue in the Kings Court, if the ſaid excommengement had not bin.

¶ Whether a Prelat may refuſe a Legacie.

Cap. 33.

IT is mooued in the ſaid ſum, named Roſella in the title Alienatio 20. the 11. article, whether a prelat may refuſe a legacy, wherin diuers opinions be recited there, which as mee thinketh, haue nēd after ȳ laws of ȳ realme to bee more plainly declared. D. I pray thē ſhew me what the law of the realme will therein. St. I think that euery Prelat and ſouereigne that may onely ſue, and be ſued in his owne name, as Abbots, Priors, and ſuch other, may refuſe any legacie that is made to the houſe: for the legacie is not perfect till hee to whom it is made aſſent to take it, for elſe if hee might not refuſe it, hee might be compelled to haue lands wherby he might in ſome caſe haue great loſſe, but

but then if he intend to refuse, hee must as soone as his title by the legacie falleth, relinquish to take the profits of the thing bequeathed, for if one take the profits therof, he shall not after refuse the legacy: but yet his successor may if he will refuse the taking of the profits to saue the house from yelding damages, or from arrerages of rēts, if any such be: e like law is of a remainder, as is in legacie, for though in ꝑ case of a remainder, & also of a deuise as most men say, the freehold is cast vpon him by the law when the remainder or deuise falleth: yet it is in his libertie to refuse the taking of the profits, and to refuse the remainder if he wil as he might do of a gift of lands, or goods, for if a gift be made to a man that refuseth to take it, the gift is void, & if it be made to a man that is absent, the gift taketh no effect in him till hee assent: no more than if a man disseise one to another mās vse, hee to whose vse the disseisin is made, hath nothing in the land, ne is no disseisor till hee agree: And to such disseisins & gifts, an Abbot or Prior may disagree, aswel as any other mā. But after some men a bishop, of a deuise, or remainder that is made to the bishop, and to the Deane and Chapter, nor a Deane and a chapter of a deuise, or remainder made to them, ne yet the master of a colledge of such a deuise, or remainder made to him & to his brethren, may not disagree without the Chapter or brethren: for the Bishop of such land as hee hath with the Deane and chapter, ne the Deane nor master of such land as they haue with the Chapter or brethren may not answere without

the

the chapter & brethē: & therfore some say that if the Deane or master will refuse, or disclaime in the lands that they haue by the deuise or remainder, that disclaimer without the chapter or brethren is void. And therefore it is holden in the law, that if a Bishop be vouched to warrant, & the tenant bindeth him to the warranty by reason of a lease made to him by the Bishop, and by the Deane & the chapter, paying a rent, that in that case the Bishop may not disclaime in the reuersion without the assent of the Deane and Chapter: But yet if a reuersion were granted to a Deane & a Chapter, and the Deane refuse, the graunt is void. And so it appeareth that the Deane may refuse to take a gift, or graunt of lands, or goods, or of a reuersion made to him and to the chapter, and yet he may not disagree to a remainder, or deuise, & the diuersitie is because the remainder and deuise be cast vpō him without any assent, whereupon neither the Deane or the Chapter by themselues, may in no wise disagree without the assent of the other: But a gift or grant is not good to them without they both assent, & in such gifts, as I suppose, an Infant may disagree aswell as one of full age, but if a woman couert disagree to a gift, and the husband agree, that gift is good. D. What if the lands in that case of a mā and his wife be charged with damages, or bee charged with more rent than the land is worth, and the husband dye, shal the wife be charged to the damages, or to the rent? St. I think nay, if the wife refuse the occupation of the ground after her husbands death,

and

and I think ẏ ſame law to be, if a leas be made to the huſband and the wife, yelding a greater rent than the land is worth, that the wife after the husbands death may refuſe the Leaſe to ſaue her from the paiment of the rent, & ſo may the ſucceſſour of an Abbot. Do. And if the huſband in that caſe ouerliue the wife, & thē make his executors and die, whether may his executors in likewiſe refuſe the leas? S. If they haue goods ſufficient of their teſtator to pay the rēt, I think they may not refuſe it: but if they haue not goods ſufficient of their teſtator to pay the rent to the end of the terme, I thinke if they relinquiſh the occupation, they may by ſpeciall pleading diſcharge themſelues of the rent & the leaſe, & if they doe not, they may lightly charge themſelues of their owne goods. And if a leaſe bee made for terme of life, the remainder to an Abbot for terme of life of I. at S. reſeruing a greater rent than the land is worth, & after the tenant for terme of life dieth, the Abbot may refuſe the remainder for the cauſe before rehearſed: and in caſe that the Abbot aſſent to the remainder, whereby he is charged to the rent during the time that hee is Abbot, and after he dyeth or is diſpoſed, liuing the ſaid I. at S. in that caſe his ſucceſſor may diſcharge himſelfe by refuſing the occupation of the land, as is aforeſaid. But I think that if ſuch a remainder were made to a Deane, and to the Chapter, and the Deane agree without the aſſent of the Chapter, that in that caſe the Deane and the Chapter may afterwards diſagree to the remainder, and that the act of the Deane with-

but the assent of the Chapter shall not charge the Chap. in ꝑ behalfe. And thus it appeareth, though the meaning of the said chapter & article in the said summe be, that a Prelat may not disagree vnto a legacy, for hurting of a house, yet he may after the lawes of the realm disagree thereto, where it should hurt his house. And if in a Præcipe quod reddat, there be but one tenãt be he spirituall or temporall, & he refuse by way of disclaimer, in such case where hee may disclaime by the law, there the land shal vest in ꝑ demandant: & if there be 2. tenants, then it shall vest in his fellowe, if he will take the whole tenancy vpon him, or els it shall vest in the demãdant. But if an Abbot or a lay man refuse the taking of the profits, and shew a speciall cause why it should hurt him if he do assent, and bee thereby discharged as is said before: in whom the land shal then vest it is more doubt, wherof I will no farther speak at this time. And thus it appeareth by diuers of the cases that be put in this chapter, that hee that is ignorant in the law of the realme, shal lack the true iudgement of conscience in many cases. For in many of these cases that may be done therin by the law, must also be obserued in conscience &c.

¶ Whether a gift made vnder a condition be void if the soueraigne onely breake the condition.

Cap. 34.

IN summa Rosella in ꝑ title Alienatio, the 12. article, is asked this questiõ, whether a gift

made vnder a certaine forme may bee auoyded or reuoked, because the prelates or soueraigne onely did breake the forme, and it is there answered, that it may not, for that the deed of the Prelate onely ought not to hurt the Church: and if those words (vnder a maner) bee vnderstood of a gift vpon condition as they seeme to bee, then the said solution holdeth not in this realme neither in law nor conscience. D. What is then the Law of England if a man enfeoffe an Abbot by deed indented, vpon condition, that if the Abbot pay not the Feoffor a certain summe of money at such a day, that then it shall bee lawfull to the feoffor to reenter, and at that day the Abbot faileth of his payment, may the feoffor lawfully reenter and put out the Abbot?

S. Yea verily, for he had no right to the land, but by the gift of the Feoffour, and his gift was conditionall, & therefore if the condition be broken, it is lawfull by the law of England for the feoffor to reenter, and to take his land again & to hold it as in his first estate: by which reentrie after the lawes of the realme, he dispossesseth the first liuerie of seisin, and all the meane acts done betweene the first feoffement and the reentry: and it forceth little in the Law, in whom the default be that the condition was not performed whether in the Abbot or in his couent, or in both, or in any other person whatsoeuer he bee, except it bee in the feoffor himselfe. And it is great diuersitie betweene a cleare gift made to an Abbot without condition, and where it is made with condition: for whē it is made without

that condition, the act of the Abbot onely shall not by the common law disherit the house, but it be in verie few cases: but yet vpon diuers statutes the sufferance of the Abbot onely may disherit the house, as by his ceasser, or by leuying of a crosse vpon a house against the statute therefor made, in which case the house therby shall lose the land, and some say that by the common law vpon his disclaimer in ahowrie, a writ of right of disclaimer lieth, but if the gift bee vpon condition, it standeth neither with law nor conscience, that the Abbot should haue any more perfect or sure estat than was giuen vnto him: and therefore as the said estate was made to the house vpon condition, so that estate may be auoided for not performing of the condition. And I thinke verily that this I haue said is to be holden in this realme, both in the Law and conscience, and that the decrees of the Church to the contrarie, bind not in this case. But if the lands bee giuen to an Abbot, and to his Conuẽt, to the intent to find a lamp, or to giue certaine alms to poore men, though the intent be not in those cases fulfilled, yet the feoffor, nor his heire may not reenter: for hee reserued no reentrie by expresse words, ne in the words, when hee said, to the intent to find a Lampe, or to giue almes &c. is implyed no reentrie, ne the feoffor, nor his heires shal haue no remedie in such cases, vnlesse it bee within the case of the statute of Westminster the secõd, that giueth the Cessauit de Cantaria.

The 35. Chapter.

¶ Whether a couenant made vpon a gift to the Church, that it ſhall not bee aliened, be good.

Cap. 35.

IN the ſaid ſumme, called Summa Roſella, the ſaid title Alienatio, the 13. article, is aſked this queſtion, whether a couenant made vpō a gift to the Church, that it ſhal not be aliened, be good. And the ſame queſtiō is moued again in the ſaid Summa called Roſella, in the tytle Cōditio the firſt article, & in Summa Angelica, in the title Donatio prima, the 51. & 52. articles, & thintent of the queſtion there, is whether notwithſtāding that the condition be good to ſome alienations, whether that yet it bee good to reſtraine alienations for the redemption of thē þ be in captiuitie vnder the Infidels, or for the greater aduantage of the houſe: & though the better opinion be there, þ the cōdition may not be brokē for redēption of them that bee in captiuitie, yet it is in maner a whole opinion that it may be ſeld for the greater aduantage to the houſe: for it is ſaid there that it may not be taken, but that the intent of the giuer was ſo, & therefore they call the condition that prohibiteth it to be ſold, conditio turpis, that is to ſay, a vile condition, wherefore they regard it not: but verily as I take it, if a condition may reſtraine any maner of alienation, then it ſhal as wel reſtraine Alienations for the two cauſes before rehearſed, as for any other cauſes: and though me thinketh that the cōdition is good, &

after

after the lawes of the Realme, that vpon gifts to the Church restraineth alienations, yet I shall touch one reason that is made to the contrary, that is this: There is a cleere ground in the law, that if a feoffement be made to a common person in fee, vpon cõdition that the feoffee shal not alien to no man, that cõdition is voyd, because it is contrary to the estate of a fee simple, to bind him that hath the estate, that hee should not alien if he list: and some say that an Abbot that hath land to him and to his successors hath as high and as perfit a fee simple as hath a lay man that hath Land to him and to his heires, and therefore they say, that it is as well against the Law of the Realm to prohibite that the Abbot shall not alien, as it is to prohibit a lay man thereof: and though it bee therein true as they say, as to the highnesse of the estate, yet mee thinketh there is a great diuersitie betweẽ the cases concerning their alienations: for when lands be giuen in fee simple to a common person, the intent of the Law is that the feoffee shal haue power to alien, and if he do alien, it is not against the intent of the Law, ne yet against the intent of the feoffor: but when lands be giuen to an Abbot and to his successors, the intent of the law is, and also of the giuer (as it is to presume) that it should remaine in the house for euer, and therefore it is called Mortmain, that is to say, a dead hand, as who saith that it shall abide there alway as a thing dead to the house. And therefore as I suppose the law will suffer that condition to be good, that is made to restraine that such Mort-

main should not be alienedand that yet it may prohibite the same condition to bee made vpon a feffement made in fee simple to a man and to his heires: for that is the most high, the most free, & the most pure estate that is in the Law. But the Law suffereth such a condition to be made vpon a gift in taile because the Statute prohibiteth that no alienation should be made thereof. And then, as the Law suffereth such a condition vpon a gift in Mortmaine, that is to say, that it shall not be alienedto be good: then it iudgeth the condition also according to the words, that is to say, if the condition bee generall that they shall alien to no man, as this case is, that it shalbe taken generally according to the words, and it shall not be taken, that the intent of the giuer was otherwise than he expressed in his gift: though percase if he were aliue himselfe and the question were asked him whether he would be contented it should bee alienedfor the sayd two causes or not, he would say ye, but when he is dead no man hath authoritie to interpret his gift otherwise than the law suffreth, nor otherwise than the words of the gift be. And if the condition be speciall, that is to say, that the land shall not be alienedto such a man or such a man, then the conditiō shall bee taken according to the words, & then they may be alienedas for that condition to any other, but to them to whom it is expressly prohibitedthat the land should not be alienedto. And if the Lands in that case be alienedto one that is not excepted in the condition, thē he may alien the land to him that is first excepted

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without breaking of the condition, for conditi-ons be taken straitly in the law and without e-quitie. And thus me thinketh, that because the said condition is general, and restraineth all a-lienations, that it may not be aliened neither by the law of the Realm, ne yet by conscience, no more for the said two causes, than it may for any other cause: and this case must of ne-cessitie be iudged after the rules and grounds of the Law of the Realme, and after no other Law as me seemeth.

¶ If the Patron present not within 6. moneths, who shall present.

Cap. 36.

IN the same sum, called Summa Rosella, in ỹ title Beneficium, in principio, it is asked, if the patron present not within six moneths, who shall present, and within what time the pre-sentment must be made. And it is answered there, that if the patron present not within 6. moneths, that the Chapter shall haue sixe moneths to present, and if the Chapter presents not within 6. moneths, that then the Bishop shall haue other 6. moneths: And if he be neg-ligent, then the Metropolitan shall haue other 6. moneths, and if he present not, then the pre-sentment is deuolute to the Patriarke: And if the Metropolitan haue no superior vnder the Pope, then the presentment is deuolute to the

Pope. And so, as it is said ther, the Archbishop shall supply the negligence of the Bishop, if he be not exempt, and if he be exempt, the presentment immediatly shall fall vpon the Bishop, to the Pope. And as I suppose these diuersities hold not in the lawes of the realme. Do. Then I pray ther shew me who shall present by the Lawes of the realme, if the patron do not present within 6. moneths? St. Then for default of the patron the bishop shal present vnlesse the King be patron, and if the Bishop present not within sixe moneths, then the Metropolitan shall present, whether the Bishop be exempt or not. And if ꝯ Metropolitan present not within the time limited by the Law, then there be diuers opinions who shall present, for some say the Pope shall present, as it is said before, and some say the King shall present.

D. What reason make they that say the king should present in that case? Stu. This is their reason, they say that the King is patron paramount of all the benefices within the realme. And they say farther, that the King and his progenitors kings of England, without time of mind, haue had authoritie to determine the right of patronages in this Realme in their owne Courts, and are bound to see their Subiects haue right in that behalfe within the realme, and that in that case from him lyeth no appeale. And then they say, that if the Pope in this case should present, that then the King should not onely leese his Patronage paramount, but also that he should not sometime be able to doe right to his subiects.

D. In

D. In what case were that? S. It is in this case: The Law of the Realm is, that if a benefice fall void, ỹ the patron shall present within 6. moneths, and if he doe not, that then the Ordinarie shall present, but yet the Law is farther in this case, that if the Patron present before the Ordinarie put in his Clerke, that then the Patron of right shall enioy his presentment, and so it is though the time should fall after to the Metropolitan, or to the Pope: and if the presentment should fall to the Pope, then though the Aduowson abode still void, so that the Patron might of right present, yet the Patron should not know to whom hee should present, vnlesse hee should goe to the Pope, and so hee should faile of right within the Realme. And if percase he went to the Pope, and presented an able Clerk vnto him, and yet his Clerke were refused and another put in at the collation of the Pope, or at the presentment of a straunger, yet the Patron could haue no remedie for the wrong within the Realme, for the Incumbent might abide still out of the Realme. And therefore the law will suffer no Title in this case to fall to the Pope. And they say, that for a like reason it is, that the Law of the Realme will not allow an excommengement that is certified into the Kings Court vnder the Popes Bulles: For if the partie offered sufficient amends, and yet could not obtaine his letters of absolution, the King should not know to whom to write for the letters of Absolution, and the party could not haue right, and that the Law will in no

wise

wise suffer. Do. The patron in that case may present to the Ordinary as long as the church is void, and if the ordinary accept him not, the Patron may haue his remedie against him within this Realme. But if the Pope will put in an Incumbent before the Patron present, it is reason that he haue the presentment, as méé séemeth before the king. S. When the Ordinarie hath surceased his time, hée hath lost his power as to that presentment, specially if the collation bée deuolute to the Pope. And also when the presentment is in the Metropolitan hée shall put in the Clerk himselfe, and not the Ordinarie: and so there is no default in the Ordinary, though he present not the Clerke of the Patron, if his time be past, and so there lyeth no remedy against him for the Patron.

D. Though the Incumbent abide still out of the realm, yet may a Quare impedit lie against him within the realme: and if the Incumbent make default vpon the distresse, and appeare not to shew his title, then the patron shall haue a writ to the Bishop according to the statute, and so he is not without remedie.

S. But in this case he cannot be summoned, attached, nor distrayned, within the Realme.

D. He may be summoned by the church, as the tenant may in a Writ of right of Aduowson.

St. There the aduowson is in demaund, & here the presentment is onely in debate: and so he cannot be summoned by the Church here no more than if it were in a writ of Annuity, and there the common returne is, quod Clericus est beneficiatus, nõ habens laicum feod' vbi potest sum-

ſummoneri. And though he might be ſummoned in the Church, yet he might neither be attached nor diſtrayned there, and ſo the patron ſhould be without remedy. D. And if he were without remedie, he ſhould yet be in as good caſe as he ſhould be if the king ſhould preſent: for if the title ſhould be giuen to the King, the Patron had loſt his preſentment clerly for the time, though the Church abide ſtill voyd. For I haue heard ſay that in ſuch preſentments no time after the Law of the Realme runneth vnto the King. St. That is true, but there the preſentment ſhold be taken from him by right and by the Law, and here it ſhould be taken from him againſt the Law, and there as the Law could not help him, and that the law will not ſuffer. Do yet me thinketh alway that the title of the Laps in ſuch caſe is giuen by the law of the Church, & not by the tempozall law, & therfoze it fozceth but little what ỹ tempozal law will in it, as mee ſeemeth. S. In ſuch countries where the Pope hath power to determine the right of tempozal things, I thinke it is as thou ſaiſt, but in this realme it is not ſo. And ỹ right of preſentment is a tẽpozal thing, and a tempozal inheritance, & therfoze I think it belongeth to the kings law to determine, & alſo to make Laws who ſhall preſent after 6. moneths aſwell as befoze, ſo that the title of examination of abilitie oz nonabilitie bee not therby taken from the Ozdinarie. And in likewiſe it is of auoidance of benefices, that is to ſay, then it ſhalbe iudged by the kings Lawes when a benefice ſhall be ſaid void, & when not,

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and not by the law of the Church, as when a parson is made a Bishop, or accepteth another benefice without a Licence, or resigneth, or is deprived, in these cases the common law saith, that the benefice is void, and so they should be, though a law were made by the Church to the contrarie: and so if the Pope should haue any title in this case to present, it should be by the Law of the Realme. And I haue not seene ne heard that the law of the Realme hath giuen any title to the Pope to determine any temporall thing that may be lawfully determined by the Kings court. D. It seemeth by that reason that thou hast made now, that thou preferrest the Kings authoritie in presentments before the Popes, & that me thinketh should not stand with the law of God, sith the Pope is the vicar generall vnder God. St. That I haue said proueth not, that for the highest preferment in presentments he is to haue authoritie to examine the abilitie of the Parson that is presented: for if the presentee be able, it sufficeth to the discharge of the Ordinary, by whom soeuer he be presented, and that authoritie is not denied by the law of the Realme to belong alway to the spirituall iurisdiction: but my meaning is, that as to the right of presentments, and to determine who ought to present, and who not, and at what time, and when the Church shall be iudged to be void, & when not, belong to the King & to his lawes: for else it were a thing in vaine for him to hold plee of Aduowsons, or to determin the right of patronage in his own courts, and not to haue authoritie to determin the

the right thereof, and those claimes seemeth not to be against the Law of God. And so me seemeth in this case the presentment is giuen the King. D. And if the King should haue right to present, then might the Church happen to cõtinue void for euer, for as wee haue said before no time runneth to the King in such presentment. S. If any such case happen, if the King present not, then may the Ordinarie set in a deputy to serue the cure as he may do when negligence is in other patrons that may present & do not: and also it cannot bee thought that the King which hath the rule and gouernãce ouer the people, not onely of their bodies, but also of their soules, will hurt his conscience and suffer a benefice continually to stand without a Curat, no more than he doth in Aduowsons that be of his owne presentment.

¶ Whether the presentment and collation of benefices and dignities, voiding at Rome belongeth only to the Pope.

Cap. 37.

IN the same sum, called Summa Rosella, in ỹ title Beneficium primũ, in the 13. article, It is said ỹ benefices, dignities, & parsonages, voiding in the court of Rome may not be giuẽ but by the Pope: & likewise of the Popes seruants and of other that come and goe from the Court, if they die in places nigh to the Court within two daies iourney, all these belong to the Pope: but if the Pope present not within

in a moneth, then after the moneth they to whō it belongeth to present, may present by themselues only, or by their vicar generall if they be in far parts: and these sayings hold not in the law of the Realme. Do. What is the cause that they hold not in this realme, aswell as in all other realms? St. One cause is this: The king in this realme according to the ancient right of his Crowne, of all his aduowsons that bee of his patronage ought to present. And in likewise other Patrons of benefices of their presentmēt, & the pleas of ꝑ right of presentments of benefices within this Realme, belong to the King and his crowne. And these titles cannot bee taken from the King and his subiects, but by their assent, and the law that is made therein to put away the title, hindeth not in this realme. And ouer that, before the statute of 25. E. 3. there was a great inconuenience and mischiefe, by reason of diuers prouisions & reseruations, that the Pope made to the benefices of this Realme, contrarie to the old right of the King and other patrons of this Realme. aswell to the Archbishoprickes, Bishoprickes, Deanries and Abbies, as to other dignities & benefices of the Church: And many times aliens thereby had benefices within the Realme that vnderstood not the English tongue, so ꝑ they could not counsaile ne comfort the people, when need required, and by that occasiō great riches was conueyed out of the Realm: wherfore to auoid such inconuenience, it was ordained by the said statute, that all patrons aswel spirituall as temporall should haue the presentments

ments freely: & in case the collation or prouision were made by the Pope in disturbance of any Spirituall Patron, that then for that time the King should haue the presentment, & if it were in disturbance of any lay Patron, that then if the patron presented not within the halfe yere after such voidance, nor the Bishop of the place within a moneth after the halfe yeare: that then the king should haue also the presentment, and that the king should haue the profits of the benefices so occupied by prouisiõ, except Abbeis and Priories, & other houses that haue colledge and couẽt, & there the colledge & couẽt to haue the profits: and because the statute is generall, & excepteth no such benefices as shall voide in the Court of Rome, or in such other place as before appeareth, therefore they be taken to be within the prouision of the said estatute aswell as the benefices that void within the Realme: & al prouisors and executors of the said collations & prouisions, & al their atturnies, notaries, & maintainers, shalbe out of the protection of ye king, & shal haue like punishmẽt as they should haue for executing of benefices voyding within the realm. D. But I cannot see how the said statute may stand with conscience, that so farre restrained the Pope of his libertie, which as mee seemeth hee ought in this case of right to haue. St. Because (as I suppose) that patrons ought of right to haue their presentments, vnder such manner as they claime them in this realme, as I haue said before, and as in the 26. chapter of this booke appeareth more at large: And also forasmuch as it appeareth euidently, that

that great inconuenience followed vpon the said prouisions, and that the said estatute was made to auoide the same, which sith that time hath beene suffered by the Pope, and hath beene alway vsed in this realme without resistance, that the said estatut should therfore stand with good conscience.

¶ If a house by chaunce fall vpon a horse that is borrowed, who shall beare the losse.

Cap. 38.

IN the said summe called Summa Rosella, in the title Casus fortuitus, in the beginning is put this case. If a man lend another a horse, which is called there Depositum, & a house by chance falleth vpon the horse, whether in that case hee shall answere for the horse? And it is aunswered there, that if the house were like to fall, that then it cannot be take̅ as a chance, but as the default of him that had the horse deliuered to him: But if the house were strong, & of likelyhood and by common presumption in no daunger of falling, but that it fell by sodaine tempest, or such other casualtie, that then it shall be taken as a chance, and hee that had the kæping of ꝑ horse shal be discharged: & though this diuersitie agreeth with the Lawes of the Realme, yet for the more plainer declaration thereof, and for the more like cases and chances that may happen to goods, that a man hath

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in his keeping that be not his owne, I shall add a little more therto, that shalbe somwhat necessary as mee thinketh to the ordering of conscience. First a man may haue of another by way of lone or borrowing, money, corne, wine, and such other things, where the same thing cannot be deliuered if it be occupied, but another thing of like nature and like value must bee deliuered for it, & such things he that they be lent to, may by force of the lone vse as his owne. And therefore if they perish, it is at his ieopardie, & this is most properly called a lone. Also a man may lend to another a horse, an ore, a cart, or such other things that may be deliuered againe, and they by force of that lone may be vsed and occupied reasonably in such manner as they were borrowed for, or as it was agreed in the time of the lone that they should be occupied, & if such things be occupied otherwise thē according to the intent of the lone, & in that occupation they perish, in what wise soeuer they perish, so it bee not in default of the owner, hee that borrowed them shalbe charged therewith in law & conscience: & if he that borrowed thē occupy them in such maner as they were lent for, & in that occupation they perish in default of him that they were lent to, then he shall answere for them: and if they perish not through his default, then hee that oweth them shall beare the losse. Also if a man haue goods to keepe to a certaine day, for a certaine recompence for the keeping, hee shall stand charged or not charged, after as default or no default shall bee in him as before appeareth, and so it is if hee haue nothing

for the képing, but if hee haue for the képing, & make promise at the time of ꝯ deliuerie to redeliuer them safe at his peril, then he shall bee charged with all chances that may fall. But if he make that promise & haue nothing for képing, I thinke he is bound to no such casualties but that bee wilfull & his owne default, for that is a nude, or a naked promise, wherupon as I suppose no action lieth. Also if a man find goods of another, if they bee after hurt or lost by wilful negligence, he shalbe charged to the owner, but if they be lost by other casualty, as if they be laid in a house that by chaunce is burned, or if he deliuer them to another to kép that rũneth away with them, I thinke he be discharged: & these diuersities hold most cõmonly vpon pledges, or where a man hireth goods of his neighbor to a certain day for certaine money: & many other diuersities be in the law of the Realme, what shalbe to the ieopardie of the one, & what of the other, which I will not speake of at this time: And by this it may appeare that it is cõmonly holdẽ in the laws of England if a common carier go by the waies that be dangerous for robbing, or driue by night, or in other inconuenient time, & be robbed, or if he ouercharge a horse, whereby hee falleth into the water or otherwise, so that the stuffe is hurt or impaired: that hee shall stand charged for his misdemeanour, and if hee would percase refuse to carry it, vnlesse promise were made vnto him that he shall not bee charged for no misdemeanour that should bee in him, the promise were void: For it were against reason & against good maners,

and

and so it is in all other cases like. And all these diuersities be granted by secũdary conclusions deriued vpon the Law of reason, without any statute made in that behalfe. And peraduẽture lawes, and the conclusions therein, be the more plaine & the more open. For if any statut were made therein, I think verily no doubts & questions would rise vpon the Statute, than doth now when they be onely argued & iudged after the common law.

¶ If a Priest haue won much goods by saying of Masse, whether hee may giue those goods or make a will of them.

Cap. 39.

IN the said sum called Summa Rosella in the title Clericus quartus the third article, is asked this questiõ: If a priest haue won much goods by saying of masse, whether he may giue those goods, or make a will of them? whereto it is aunswered there, that hee may giue them, or make a will of them, specially when a man bequeths mony for to haue Masses said for him: & the like law is of such things as a clerke winneth by the reason of an office: For it is sayd there, that such things come to him by reason of his owne person: which sayings I think accord wt the law of ye realme. But for asmuch as in the said article & in diuers other places of ye said chapter, & in diuers other chapters of the said Summe, is put great diuersitie betweene such goods, as a Clerke hath by reason of his

church, and such goods as he hath by reason of his person, & that hee must dispose such goods as he hath by reason of his church in such maner as is appointed by the law of the Church, so that he may not dispose them so liberally, as he may the goods ꝑ come by reason of his owne person, therefore I shall a little touch what spirituall men may doe with their goods after the law of the Realme.

First a Bishop, of such goods as he hath with the Deane and Chapter, hee may neither make gift nor bequest, but of such goods as hee hath of his owne by reason of his church, or of ꝑ gift of his auncestors or of any other, or of his patrimony, hee may both make gifts and bequests lawfully. And an Abbot of the goods of his Church may make a gift, and that gift is good as to the Law: But what it is in conscience, that is after the cause and intent and qualitie of the gift, for if it bee so much that it notably hurteth the house or the couent, or if he giue away the bookes, or the chalices, or such other things as belong to the seruice of god, he offendeth in conscience, and yet he is not punishable in the Law, ne yet by Subpena after some men, ne in none otherwise but by the Law of the church, as a waster of the goods of his monasterie. But neuertheless I will not fully hold that opinion, as to that that belongeth necessarily to the seruice of God, whether any remedy lye against him or not, but remit it to the iudgement of other. And of a Deane & Chapter, and a Master & brethren of goods that they haue to thēselues, & also of goods that they haue with

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the Chapter & brethren, the ſame diuerſity hol-deth, as appeareth before of a Biſhop and the Deane & Chapter, except that in the caſe of a Maſter & brethren the goods ſhalbe ordered as ſhalbe aſſigned by the foundation. And moreo-uer, of a Parſon of a Church, Vicar & Chauntry Prieſt, or ſuch other, al ſuch goods as they haue aſwel ſuch as they haue by reaſon of the Par-ſonage, Vicarage, or Chauntrie, as that they haue by reaſon of their owne perſon, they may lawfully giue and bequeath where they will af-ter the common Law: And if they diſpoſe part among the pariſhioners, & part to the building of Churches, or giue part to the Ordinary, or to poore men, or in ſuch other manner, as it is appointed by the law of the church, they offend not therein, vnles they think themſelues boun-den thereto by dutie, & by authoritie of the law of the church, not regarding the kings Lawes, for if they do ſo, it ſeemeth they reſiſt the Ordi-nãces of God, which hath giuẽ power to prin-ces to make lawes: but there as the Pope hath ſouereignty in temporall things, as he hath in ſpirituall things, there ſome ſay that the goods of Prieſts muſt in conſcience be diſpoſed as is contained in the ſayd ſumme, but that holdeth not in this Realme: for the goods of ſpirituall men be temporall in what manner ſoeuer they come to them, & muſt be ordered after the tem-porall law as the goods of the temporall men muſt be. Howbeit if there were a ſtatute made in this caſe of like effect in many points, as the law of the Church is, I thinke it were a right good and a profitable Statute.

¶ Who shall succeed a Clerke that dyeth intestate.

Cap. 40.

IN the said sum called Rosella in the chapter Clericus quart' the 7. Article, is asked this question, who shall succeed to a Clerke that dyeth intestate, & it is answered, that in goods gotten by reason of the church, the church shall succeed. But in other goods his kinsmen shall succeed after the order of the law, & if there be no kinsman, then the church shall succeed. And it is sayd further, that goods gotten by a Cannon secular by reason of his church or prebend shall not go to his successor in the prebend, but to the Chapter. But where one that is beneficed is not of the congregation, but he hath a benefice clerely seperate, as if he be a parson of a parish Church, or is a president, or an Archdeacon not beneficed by the Chapter, then the goods gotten by reason of his benefice, shall goe to his successor, & not to the Chapter, and none of these sayings hold place in þ lawes of England. D What is then the Law, if a Parson of a Church, or a Vicar in the Countrie dye intestate, or if a Cannon secular be also a Parson and have goods by reason thereof, and also by a Prebend that he hath in a Cathedrall Church, & he dye intestate, who shall have his goods? S. At the common Law the Ordinary in al these cases may administer the goods, and after hee must commit administration to the next

next faithfull friends of him that is dead intestate that will desire it, as he is bound to doe where lay mē ꝯ haue goods die intestat. And if no man desire to haue administration, then the Ordinarie may administer & se the debts payed, and he must beware that he pay the debtes in such order as is appointed in the common Law: for if he pay debts vpon simple contracts before an Obligation, he shall be compelled to pay the debt vpon the obligation of his owne goods, if there be no goods sufficient of him that died intestat, and though it be suffred in such case that the Ordinary may pay pound and pound like, that is, to apportion the goods among the debtors after his discretion, yet by the rigor of the common Law, he might be charged to him that can first haue his iudgment against him. And furthermore by that is said afore in the last Chapter it appeareth that if a Bishop that hath goods of his patrimonie, or a master of a Colledge, or a Dean of goods, that they haue of their owne onely to themselues dye intestate, that the Ordinarie shall commit administration thereof, as before appeareth, and if they make Executors, then the executors shall haue the ministration thereof: But the heires nor the kinsmen by that reason only that they be heires or of kin to him that is deceased, shall haue no medling with his goods, except it be by custom of some countries where the heires shal haue their lons, or where the children (the debts & legacies paid) shall haue a reasonable part of the goods after the custome of the Countrie.

The 41. Chapter.

¶ If a man be outlawed of felonie, or be attainted for murder or felonie, or that is an Asciſmus, may be ſlayne by euerie ſtranger.

Cap. 41.

IT appeareth in this said sum called Summa Angelica in the xxj. Th. in the title of Asciſmus the 2. Paragrafe, that he is an Asciſmus that will slay men for money at the instance of euerie man that will moue him to it, and such a man may lawfully be slayne, not onely by the Judge, but by euerie priuat person. But it is said there in the 4. paragrafe, that he must first be iudged by ꝑ law as an Asciſmus ere he may be slaine, or his goods seised. And it is sayd further there in the 2. paragrefe, that also in conſcience such an Asciſmus may be slaine if it bee done through a zeale of iuſtice, and eiſe not. Is not the law of the realme likewiſe of men outlawed, abiured, or iudged for felonie?

S. In the law of the realme there is no such Law, that a man shall be iudged as an Asciſmus, ne if a man be in full purpoſe for a certain ſumme of money that he hath receiued, to slay a man, yet it is no felony, ne murder in the law till he hath done the act: for intent of felony nor murder is not puniſhable by the common law of the Realme, though it be deadly ſin before God, but in Treaſon or in ſome other particuler cales by ſtatute that intent may be puniſhed. And though a man in ſuch a caſe kill a man for money: yet it ſhall not be admitted that he

he is an Aſciſmus. For as it is ſayd before, there is no ſuch terme of Aſciſmus in the law of the Realme, but he ſhal in ſuch caſe be arrained vpon the murther. And if he confeſſe it or plead that he is not guilty, & is found guilty by xij. men, he ſhall haue iudgement of life, and of member, and ſhall forfait his lands and goods. And like Law is of an appeale brought of the murther, if he ſtand dumbe and will not anſwer to the murther, he ſhall be attainted of the murther, & ſhall forfeit life, lands & goods: But if he be arraigned of the murther vpõ an Indictment at the Kings ſuit, and thereupon ſtandeth dumbe and will not anſwer, there he ſhal not be attainted of the murther, but he ſhal haue paine fort and dure, that is to ſay, he ſhal be preſſed to death, and he ſhal there forfait his goods, and not his lands. But in none of theſe caſes (that is to ſay) though a man bee Outlawed for murther or felonie, or be abiured, or that hee be otherwiſe attainted: yet it is not lawfull for any man to murther him, or ſlay him, ne to put him in execution but by authoritie of the Kings Lawes. Inſomuch that if a man bee adiudged to haue paine fort and dure, and the officer beheadeth him, or on the contrariwiſe putteth him to paine fort and dure, where hee ſhould behead him, he offendeth the law. And if an officer which hath authoritie to put a man to death, may not put him to death but according to the iudgement, then me thinketh it ſhould follow that more ſtronger a ſtraunger may not put ſuch a man to death of his owne authoritie without commandement

of

of the Lawe. But if the iudgment be that he shalbe hanged in chaines, & the officer hangeth him in other things and not in chaines, I suppose he is not guiltie of his death: But some say he shall there make a fine to ꝯ king, because he hath not followed the wordes of the iudgement.

Also if a man that is no officer would arrest a man that is outlawed, abiured, or attainted of murther or felonie, as is aforesaid, & he disobeyeth the arest, & by reaſō of the disobedience he is slaine, I suppose the other shal not be impeached for his death: for it is lawfull vnto every man to take such persons & to bring thē forth that they may be ordred according to the lawe. But if a Capias be directed vnto the shirife to take a man in an action of debt or trespasse, there no man may take the man, but he hane authoritie from the Shirife: and if any man attēpt of his own authoritie to take him, & he resisteth, & in the resisting is slaine, he that would haue taken him is guiltie of his death.

¶ Whether a man shall be bounden by the act or offence of his seruant or officer.

Cap. 42.

IN the sayd sum called Summa Angelica, in the title Dominus iiij. Paragrafe, is asked this question, whether a man shalbe charged for his houshold: and it is said that there he shal answer when the houshold offendeth in an office or ministry

nistry that the Master is the chiefe officer of, and he hath the worke and the profit of the household: For it shall be his default that he would chuse such seruants, for he ought to appoint honest persons: But it is said there, that it is to be vnderstood ciuilly, & not criminally, wherby, as is sayd there, he that is a gouernour is bound for the offence of his officers, & that the same is to be holden of a Captaine, that he shal be bound for the offence of his squires, and an host for his guest, and such other. Neuertheles it is said there, that certaine Doctors, there rehearsed, said therto, that if the office be an open or publike office, as an office of power, or other like, It sufficeth to bring forth him that offended: But it is otherwise if it be not a publike office, but an host or a Tauerner, or other like But if the household offend not in the office the Lord is not bound as to the Law, but in conscience he is bound if he were in default by not correcting them, for he is bound to correct them both by word and example, and if he find any incorrigible, he is bound to put him away, except that he haue presumptions, that if he doe so, he will be the worse, and then hee may doe that he thinketh best, and he is excused, and else not: For to such persons it is said, Error qui non resistitur, approbatur: (that is to say) an Error that is not resisted, is approued. And though diuers of the sayings before rehearsed agree with the Law of the Realme, yet all doe not so, and also they that do are to be obserued by authoritie of the law of the Realm, & not by the authoritie alledged in the sayd Paragraf.

And

And therefore I intend to treat somewhat where the Master shall be charged by his seruant, or deputie, or by them that be vnder him in any office, & where not, and then I intend to touch some other things, where the Master after the Lawes of the Realme shall be charged by the act of his seruant in other cases not concerning offices, and where not.

First, if a man be committed to ward vpon arrerages of accompt, & the keeper of the prison suffereth him to go at large, then an action of debt shall lye against him. And if he be not sufficient, then it lyeth against him that committed the keeping of the prison vnto him, and that is by reason of the statute of West. the 2. ca. 11. Also if Bailifes of Franchises that haue Returne of writs make a false returne, the partie shall haue auerrement against it, aswell of two little issues as of other things, aswell as he shall haue against the sherife, but al the punishment shall be onely vpon the bailife, & not vpon the Lord of the Franchise, and that doth appeare by the statute made in the first yeare of King Ed. 3. the 1. chapter. But if an vndershirife make a returne wherupon the shirife shall be amerced, there the high Sherife shall be amerced, for the returne is made expressly in his name. But if it be a false returne whereupon an action of disceit lyeth, in that case it may be brought against the vndershirife. And see therof the statute that is called Statutum de male returnantibus breuia.

Also if the kings Butler make deputies, he shall answer for his deputies as for himselfe, as

as appeareth in the ſtatut made in the 25. yere of King Edward the 3. De proditionibus the 21. Chapter.

Alſo, in ỹ ſtatute that is called Statutum ſcaccarij it is enacted among other things, that no officer of the Exchequer ſhal put any clerk vnder him, but ſuch as he will aunſwere for. And forasmuch as the ſtatute is generall, it ſeemeth that he ſhall anſwere as well for an vntruth in any ſuch clerke as for an ouerſight.

Alſo in the 14. yere of King. E. the 3. ca. 9. it is enacted, that all Gails ſhall be appointed againe to the Shires, and that the Sherife ſhall haue the keeping of them, and that the Sherife ſhall make ſuch vndergardeins for the which they will aunſwere. And neuertheleſſe I ſuppoſe that if there be an eſcape by default of the Gailer, that the king may charge the Gailer if hee will. But it is no doubt but he may charge the Sherife by reaſon of this ſtatut if he wil. But if it bee a wilfull eſcape in the Gailer which is felony in him, the Sherife ſhal not be bound to aunſwere to the felonie, ne none other but the Gailer himſelfe, and they that aſſented to him.

Alſo if a man haue a Sherifewicke, Conſtableſhip, or Bailywicke in fee, whereby he hath the keeping of priſoners, if hee let any to replevin that bee not replevinſhable, and thereof bee attaint, hee ſhall leeſe the office &c. And if it bee an Vnderſherife, Conſtable, or Bailife, that hath the keeping of the priſon, that doth it without knowledge of the Lord, he ſhall haue impriſonment by three yeares, and after ſhall be raunſomed at the Kings will, as appeareth in

in the statute of West. the 1. the 15. chap. And so it appeareth, that in this case, hee that is the Lord of the prison, is not bound to answere for the offence of them that haue the rule of the prison vnder him, but that they shall haue the punishment themselues for their misdemeanor. Also there is a statute made in the 27. yeare of king Ed. 3. the 19. Chap. that is called the statute of the Staple, whereby it is ordained, that no Merchant, ne none other man shal not leese their goods for the Trespas, or forfeit of their seruants, vnles it be by commandement of his Master, or that he offend in the office that his Master hath put him in, or els, that the Maister shalbe bound to answere for the deed of his seruant by the law marchant, as in some place it is vsed.

Also, it is enacted in the 14. yeare of King Edward the 3. the 8. Chapter, that Wapentakes and Handreds that bee seuered from the Counties, shall be adioined againe vnto them, and that if the Sherife hold them in his owne hands, that hee shall put in them such bailifes that haue lands sufficient, and those for which hee will answere, and that if hee let them to ferme, that they bee let to the auntient ferme: but after it is prohibited by the Statute of the 22. yeare of king Henrie the 6. the 10. Chapter, That no sherife shall let his Bailiwikes, nor Wapentakes to ferme. And when they be once in the Sherifes owne hands, and the sherife put in Bailifes, they bee but as Vnderbailifes to the King, and the sherife the high bailife, and they in maner the sheriffes seruants and put in

only

only by him: And therefore by the said statut of King Ed. the 3. hee shall aunswere for them, if they offend in their office, but if the Sherife let thē to ferme, then though the sherife offend the statute in that doing, yet whether hee shall be charged for their misdemeanor in the office or not, is a great doubt in some men, for they say that this statute is onely to bee vnderstood where the bailiwikes be in the sherifes hands, but here they bee not so, ne the bailifes bee not his seruants, but his fermours: And therefore they say, that if the Sherife shal be charged for them, it is by the common Law, and not by the statute aforesaid. Also in the 2. peare of King Henry the vj. the xiij. Chap. it is enacted, that Officers by patent in euery court of the King, that by vertue of their Office haue power to make clerks in the said courts, shalbe charged & swoorne to make such clerks vnder them, for whom they will aunswere. Also the Hospitelers & Templers be prohibit they shall hold no plee that belongs to the Kings Courts, vpon pain to yeld damages to the partie grieued, & to make ransome to the king: that the superious, shal answere for their obediencers, as for their owne deed. West. 2. cap. 43. Also the Serieant of the Catery shall satisfie all the debts, damages, and executions that shall bee recouered against any that is purueior, or achator, vnder him that offend against the Statute of xxxvj. of Edw. the iij. or against the statute of xxiij. of Henrie the vj. in case the purueiour, or achatour bee not sufficient &c. And the partie plaintife shall haue a Scire facias against ȳ said ser-

sergeant in this case to haue execution, as appeareth in the 24. yeare of King Henry the vj. the 1. chapter.

Also if a man be sent to prison vpon a Statute merchant by the Maior, before whom the recognisance was taken, & the Gaior will not receiue him, he shal answere for the debt if hee haue wherewith, & if not, then he shall answere that committed the Gaile to him, as appeareth in the statut called the statut marchant.

And if Outragious tolle bee taken in the towne Marchant, if it be the Kings towne let to farme, the king shal take the franchise of the market into his hands: And if it bee done by the Lord of the Towne, the King shall doe in likewise: And if it be done by the Bailife, vnknowing to the Lord, he shall yeeld againe as much as hee hath taken, and shall haue imprisonment of 40. daies: And so it appeareth that the Lord in this case shall not aunswere for his Bailife, West. the 1. cap. 30. And in all the cases before rehearsed, where the superiour is charged by the default of him that is vnder him, hee in whose default his superiour is so charged, is bound in conscience to restore him that is so charged through his default: except ꝑ case before rehearsed of the Hospitelers, for all that the obediencer hath, is the superiors if he will take it. And therefore what recompẽce shalbe made by the obediencer in that case, is al at the will of the superiour. And now I intend to shew thee some particuler cases, where the master after the laws of ꝑ realme shalbe charged by the act of his seruant, bailife, or deputy, & where

whether not, and so for to make an end of this Chapter.

First, for trespasse of batterie, or wrongfull entry into lands or tenements, ne yet for Felony or murder, the master shall not be charged for his seruant, vnlesse hee did it by his commandement.

Also if a seruant borrow money in his masters name, the Master shall not bee charged with it, vnlesse it come to his vse, & that by his assent. And the same law is if the seruant make a contract in his masters name, the contract shall not bind his master, vnlesse it were by his masters commandement, or that it came to the masters vse by his assent. But if a man send his seruant to a faire or market, to buy for him certaine things, though hee commaund him not to buy them of no man in certaine, and the seruãt doth according, the master shal be charged, but if the seruant in that case buy them in his owne name, not speaking of his Master, the Master shall not be charged, vnles the things bought come to his vse.

Also if a man send his seruant to the market with a thing which he knoweth to be defectiue to be sold to a certaine man, and hee selleth it to him, there an action lyeth against the Master: but if the master biddeth him not sell it to any person in certaine, but generally to whom hee can, and hee selleth it according, there lyeth no action of deceit against the master.

Also if the seruant keepe the Masters fire negligently, whereby his masters house is brẽt and his neighbours also, there an action lyeth

against the Master. But, if the seruant beare fire negligently in the street, and thereby the house of another is burned, there lyeth no action against the Master.

Also, if a man desire to lodge with one, that is no common Hosteler, and one that is seruāt to him that he lodgeth with, robbeth his chamber, his master shall not bee charged for that robbing: but if he had bēn a common Hosteler he should haue bin charged.

Also, if a man be gardein of a prison, wherein is a man that is condemned in a certaine summe of money, and another that is in prison for Felony, and a seruaunt of the gardeine that hath the rule of the prison vnder him, wilfully letteth them both escape: in this case the gardeine shall aunswere for the debt, and shall pay a fine for the escape of the other, as for a negligent escape, and the seruaunt only shall be put to aunswere to the felony, for the wilful escape.

Also, if a man make another his generall receiuour, and that receiuour receiueth money of a creditour of his Master, and maketh him acquitance, and after payeth not his Master, yet that payment dischargeth the creditour: but if the creditour had taken an acquitance of him without paying him his money, that acquitance only were no barre to the Master, vnlesse hee made him receiuer by writing, and gaue him authoritie to make acquitances, and then the authoritie must bee shewed. And if the creditour in such case by agreement betwéene the receiuour and him, deliuered to the

receiu-

receiuer a horse or another thing in recõpence of the debt, that deliuerie dischargeth not the creditour, vnlesse it be deliuered ouer vnto the Master, and hee agree to it. For the receiuer hath no such power to make no such commutation, but his master giue him speciall commandement thereto.

Also, if a seruant shew a Creditour of his master, that his master sent him for his money, and hee payeth it vnto him, that payment dischargeth him not, if the master did not sẽd him for it indeed, except that it come after vnto the vse of the master by his assent.

Also, if a man make a bailife of a manor, and after the Lord of whom the Manor is holden grant the seigniorie to another, and the baylife after payeth the rent to the grauntee, that payment of the rent counteruaileth no attournement though it were by fine, ne shall not bind his Master, till hee attorne himselfe: but if the Lord of whom the land is holden disseised one of the seigniory, and the bailife payeth the rent to the heire of the Lord, that is a good seisin to the heir, though the bailife had no commaundement of his Master to pay it: For it belongeth to his office to pay rents seruice, but not rent charge as some men say.

Also, an encrochment by the bailife shall not bind the master in auowrie, if he had no cõmãdement of the master to pay it. Also if there bee Lord, mesne, and tenant, & the tenaunt holdeth of the mesne as of his manor of D. the mesne maketh a bailife, and after the tenant maketh a feffement, the feffee tendeth notice to the bailife,

and he accepteth his rent with the arrerages, this notice shall not bind the Lord, ne compell him to alter his auowrie: for the office of a bailife stretcheth not thereto, but hee must haue therein a speciall commandement of his Master. Also if a seruant ride on his masters horse to doe an errant for his Master into a Towne that hath authoritie to make attachments of goods vpon plaints of debt &c, and there vpō a plaint of debt made against the seruant, the Masters horse is attached by the Officers, thinking that the horse were his owne, and because the seruant appeareth not, ꝯ officers seise the horse as forfeit: in this case the Lord shall haue an action of trespas against the officers, & this attachmēt for the debt of his seruant, shall not bind him &c. But that an hoast or keeper of a Taucrne shalbe charged for their guests, vnlesse it be done by their assent or cōmandemēt, I do not remember that I haue read it in the lawes of England.

¶ Whether a villaine, or a bondman may giue away his goods.

Cap. 43.

IT appeareth in the said sum, called Summa Angelica, in ꝯ title Donatio prima the 9. Paragrafe, that a bondman, or a religious man, a Monke, ne such other that hath nothing in proper, may not giue, but it bee by licence of their superiour: but that saying is not, as it is said

layd there, to be vnderstood of Religious persons that haue lawfull ministration of goods, for if they giue with a cause reasonable, it is good, but without cause they may not.

Also if they by the licence of the prelat with the counsell of the more part of the Couent abide at schole or goe on pilgrimage, they may giue as other honest scholers and pilgrimes be reasonably wont to doe: and they may also giue almes where there is great nede, if they haue no time to aske licence.

Also if they see one in extreame necessity, they may giue almes though their superiors prohibite them, for then all things bee in common by the law of God. And therfore they be bound for to doe it, as appeareth in the forelaid sum called Summa Angelica in ℣ title Eleemosina, the 6. Paragrafe. Doth not the Law of England agree with these diuersities? Stu. Forasmuch as the question is onely made whether a Villaine or a bondman may giue away his goods or not: and it seemeth that after the aforelayd sum, in the tytle which thou hast before rehearsed, that he ne none other that hath no property may not giue, wherby it appeareth that the layd summe taketh it, that a bondman should haue no property in his goods, and that therefore his gift should be void, I shall somewhat touch what propertie and what authoritie a Villeine hath in his goods after the Law of the Realme, and what authoritie the Lord hath ouer them. And I will leaue the diuersities that thou hast remembred before of Religious persons to them that list to treat

further therein hereafter.

First if a Villeine haue goods either by his owne proper buying and selling, or otherwise by the gift of other men, he hath as perfit a propertie, and also as whole interest in them, and may as lawfully giue them away as any free man may. But if the Lord seise them before his gift, then they be the Lords, and the interest of the villeine therein is determined.

Also if the Lord seise part of the goods of his Villeine in the name of all the goods that the Villeine hath or shall hereafter haue, that seisure is good, for all the goods that he had at the time of the seisure. But if goods come to the Villeine after the seisure, he may lawfully giue them away notwithstanding the sayd seisure.

Also if the Lord claime all the goods of the villein, and seiseth no part of them, that seisure is voyd, and the gift of the villein is good notwithstanding that seisure.

Also if a man be bound to a Villeine in an obligation in a certaine sum of money, and the Lord seiseth the obligation, then the obligation is his, but yet he can take no action thereupon but in the name of the villeine: and therefore if the villeine release the debt, the Lord is barred by that release.

Also if a woman be a niese, and she marieth a free man, the goods immediatly by the marriage be the husbands, and the Lord shall come too late to make any seisure: and if the husband in that case maketh his wife his Executrix and

and dyeth, and the wife taketh the same goods againe as executrix to her husband, yet it shall not be lawfull for the Lord to take them from her, though she be a niece as she was before the mariage.

Also if goods be giuen to a man to the vse of a Villeine, and the Lord seiseth those goods, the seisure after some men is good by the Statute made in the 19. yere of K. H. 7. wherby it is enacted, ỹ the Lord shall enter into lands whereof other persons be seised to ỹ vse of his villein: and they say that the same Statute shall be vnderstood by equitie of goods in vse, aswell as of Lands in vse.

Also if a Villein be made a priest, yet neuertheless the Lord may seise his goods and lãds as he might before: & vntill the seisure he may alien them and giue them away as he might before he was priest. And in this case ỹ Lord may order him, so that he shall do him such seruice as belongeth to a Priest to do, before any other: but he may not put him to no labor nor other businesse, but that is honest and lawfull for a Priest to doe.

Also if a Villeine enter into Religion in his yeare of prowe, he may dispose his goods as he might haue done before he toke the habit vpon him.

And in likewise the lord may seise his goods as he might haue done before, but if he after make executors, and be professed, and the executors take the goods to the performance of the will, then the Lord may not seise the goods though the executors haue them to the perfor-

mance of the wil of him that is his villein, nor in that case the Lord may not seise his body, ne put him to no maner of labour, but must suffer him to abide in his religion vnder the obediēce of his superior as other religious persons do, that be not bounden: And the Lord hath no remedie in that case for losse of his bondman, but onely to take an action of Trespas against him that receiued him into Religion without his licence, & therevpon to recouer damages, as shall be assessed by xij. men. Many other cases there be concerning the gift of the goods of a villeine, whereof I shall speake no more at this time, for this that I haue said sufficeth to shew that the knowledge of the Kings law is right expedient to the good order of conscience concerning such goods.

¶ If a Clerke be promoted to the tytle of his patrimony, and after selleth his patrimony and after falleth to pouertie, whether shall he haue his tytle therein or not.

Cap. 44.

In the said summe called Rosella, in the title Clericus quartus, the 24. article, it is asked, if a Clerke be promoted to the tytle of his patrimony, whether hee may alien it at his pleasure, & whether in that alienation the solemnitie needeth to be kept, that is to be kept in alienations

nations of things of the church: and it is aunſwered there, that it may not be aliened no more than the goods of a Spirituall benefice, if it be accepted for a title, and expreſly aſſigned vnto him, ſo that it ſhould goe as into a thing of the church, except he haue after another benefice whereof he may liue. But if it be ſecretly aſſigned to his Tytle, ſome agree it may be aliened: and in this caſe by the Lawes of the Realme, it may be lawfully aliened whether it be ſecretly or openly aſſigned to the Tytle, for the Ordinarie ne yet the partie himſelfe after the old cuſtome of the Realme, haue no authoritie to bind any inheritance by authoritie of the Spirituall law: and therefore the land after it is aſſigned and accepted to be his title, ſtandeth in the ſelfeſame caſe to bee bought, ſold, charged, or put in execution, as it did before. And therefore it is ſomewhat to be marueyled that Ordinaries will admit ſuch land for a tytle, to the intent that he that is promoted ſhould not fall into extreame pouertie, or go openly a begging, without knowing how the cõmon law will ſerue therin: for of mere right all inheritances within this realme ought to be ordered by the kings lawes, and inheritance cannot be bound in this Realme but by fine, or ſome other matter of record, or by feoffemẽt or ſuch other, or at leaſt by a bargain that chãgeth an vſe. And ouer that to aſſigne a ſtate for terme of life to him that hath a fee ſimple before, is voyd in the Lawes of England without it be by ſuch a matter that it worke by way of concluſion or eſtoppel, and in this caſe is no

ſuch

such matter of conclusion: and therefore all that is done in such case in assigning of the sayd title is void. Also there is no interest that a man hath in any manor, Lands, or tenements for terme of life, for term of yeres, or otherwise, but that he by the law of the realme may put away his right therin if he will. And then when this man alieneth his Land generally, it were against the law of the Realme that any interest of such a Title should remaine in him against his owne sale: & there is no diuersity, whether the assignement of the Title were open or secret, and so the Tytle is voyd to all intents. And in likewise if a house of Religion, or any other spirituall man that hath graunted a title after the custome vsed in such tytles, sell all the lands and goods that they haue, that sale in the lawes of England is good as against the tytle, and the buyer shall neuer be put to aunswer to the title. Also some say, that vpon the common titles that be made daily in such case, that if he fall to pouerty that hath the title, he is without remedy: for they be so made that at the common Law there is no remedie for them, and if he take a suit in the Spirituall court, many men say that a Prohibition or a Præmunire lyeth. And therefore it were good for Ordinaries in such case to counsell with them that bee learned in the Law of the Realme to haue such a forme deuised for making of such titles, that if need bee, would serue them that they be made vnto, or else let them be promoted without any title, and to trust in God, that if they serue him as they ought to doe, he will prouide for them

to

to haue sufficient for them to liue vpon. And beside these cases that I haue remembred before, there be many other cases put in the sayd sums for the well ordering of conscience, that as me thinketh are not to be obserued in this Realme, neither in Law nor conscience.

Do. Dost thou then thinke that there was default in them that drew the sayd sums, and put therein such cases and such solutions that as thou thinkest hurt conscience, rather than to giue any light to it, specially as in this Realme? St. I thinke no default in them, but I thinke that they were right well and charitably occupied, to take so great paine and labor as they did therein, for the wealth of the people and clearing of their conscience: for they haue thereby giuen a right great light in conscience to all Countries where the law Ciuill and the Law Cannon be vsed to temporall things. But as for the Lawes of this realme they knew them not, ne they were not bound to know them, and if they had knowne them, it would little haue holpen them for þ countries that they most specially made their treatises for: And in this countrie also they be right necessarie and much profitable to al men, for such doubts as rise in conscience in diuers other maners not concerning the law of the realme. And I maruell greatly that none of them that in this Realme are most bounden to doe that in them is to keepe the people in a right iudgement, and in a clearenesse of conscience, haue done no more in time passed to haue the Law of the Realme knowne than they haue done,

for

for though ignorance may sometimes excuse, yet the knowledge of the truth, and the true iudgement is much better, & sometime though ignorance excuseth in part, it excuseth not in al: and therefore me thinketh they did very wel if they would yet be callers on to haue that point reformed as shortly as they could. And how because thou hast well satisfied my mind in many of these questions that I haue made, I purpose for this time to make an end. D. I pray thee yet shew me or that thou make an end mo of these cases, that after thine opinion be set in diuers bookes of learning of conscience, that as thou thinkest for lacke of knowledge of the Law of the Realme, doe rather blind conscience, than giue a light vnto it: for if it be so, then surely, as thou hast said, it would be reformed, for I thinke verily the Lawes of the Realme in many cases must in this Realme bee obserued as well in conscience, as in the iudiciall Courts of the Realme. S. I wil with good wil shew to thee shortly some other questions, that bee made in the sayd sum, to giue thee another occasion, to see therein the opinions of the said summes, and to see farther thereupon how the opinions and the Lawes of the Realme do agree together. And yet beside these questions that I intend to shew vnto thee, there be many other questions of the sayd sums, that had as great need to bee more plainely declared according to the Lawes of the Realme, as those that I shall shew thee hereafter, or as I haue spoken of before: but to the cases that I shall speake of hereafter I will shew thee no

thing

thing of my conceipt in them, but will leaue it to other that will of charitie take some further paine hereafter in that behalfe.

¶ Diuers questions taken out of the Student of the sums, called Summa Rosella, and Summa Angelica, which he thinketh necessarie to be looked vpon, and to be seene how they stand and agree with the law of the Realme.

Cap. 45.

The first question is this, whether a custome may breake a law positiue. Summa Rosella, titulo Consuetudo para. 13.

The second is, if a man attainted or banished be restored by the Prince, whether shal that restitution stretch to the goods, Summa Rosella in the title Damnatus, in principo.

Item, if a man be outlawed of felony, abiured, or attainted of murther or felony, or he that is an Asciſmus may be slain by strangers: and see like matter thereto, Summa Angel. in the title Asciſmus para. 11.

This question is somewhat answered to, in a new addition, as appeareth before in the 41. Chapter.

Item, whether the master shal bee bound by the act, or offence of his seruãt, or officer, Sũma An-

Angel. in the title Dominus, para. 4.

This question is aunſwered to in an addition, as appeareth before the xlij. Chapter.

Item, whether a villaine may giue away his goods. Summa Angelica, in the title Donatio prima, para. 9.

This question is anſwered to in an additiõ as appeareth before in the 43 Chap.

Item, whether an Abbot may giue &c. Sũma Angelica, in the title Donatio 1. Para 10. & 34.

Item, whether a woman couert may giue away any goods. And it is anſwered. Summa Angelica, in the title Donatio 1 Para. 11. that ſhee may not, without ſhee haue goods beſide her dowrie, but only in almes.

Item, if a man do treaſon, whether his gift of goods after, before attainder, be good. Summa Angelica, in the title donatio 1. para. 12. & it ſeemeth there nay, and looke Summa Angelica, in the title Alienatio, para. 24.

Item, if a man wittingly make a contract betweene two kinſfolke, or other that may not lawfully marrie together, whether he hath forfeit his goods. Summa Ang. in the title Donatio 1. para. 14.

Item, whether the Father may giue to the ſon. Summa Ang. in the title donatio prima par. 19. and Summa Roſella, in the title Donatio 2. par. 42.

Item, whether a man may giue aboue v. C. S. abſque inſinuatione. Summa Ang. in the title donatio 1. par. 20.

Item, whether a gift ſhall be auoided by an in-

ingratitude, Summa Rosella, in the title Donatio 1. parag. 17. & 29. and there it is said, ẏ the gift is void by the Law of nature, & looke Summa Angelica, in the title Donatia prima, Paragrafe 42. & 45.

Item, where any gift betwéen the husband and the wife may bee good, and it is said yea, when the husband giueth it, Causa remunerationis. Summa Rosella, in the title Donatio 1. para. 32.

Item if a man make a will, & enter into religion, whether he may after reuoke the wil, and it is said, that Friers Minors may not, and other may. Summa Rosella, in the title donatio 1. para. 35. in fine.

Item, if a mā giue another a towne with all the rights that he hath in the same, whether the patronage &c. and the tithes passe. Summa Rosella, in the title Ecclesia 1. para. 56.

Item, whether all that is bought with the money of the Church be the churches. Summa Rosella in the title Ecclesia 1. para. 7.

Item, if a gift made to Monastery, may bee auoided by that the giuer hath children after the gift. Summa Rosella, in the title Donatio 1. para. 43.

Item, if a man buy a thing vnder the halfe price, whether he be bound by the Law to restore &c. Summa Rosella, in the title Emptio & venditio, para. 6.

Item, whether a cōmon théefe, vel cōmunis depopulator agrorum may abiure, Summa Rosella, in the title Emunitas 2, in principio. Et habetur

betur ibi in fine, qđ licet leges excipiant plures personas tum per ius canonicum legibus derogatum est.

Item, whether a man shall take the Church for great enormious offences that is not murther, nor felony. Summa Rosella, in the title Emunitas 2. Parag. 3. 11.

Item, if a man take one in the high way, and draw him out, & there beateth him, whether hee shal haue ꝑ punishment that is ordained for thē that strike one in the high way. Summa Rosella, in the title Emunitas 2. Para. 6.

Item, whether hee that taketh the Church may after the offence be iudged to death. Summa Rosella, in the title Emunitas 2 para. 8.

Itē, whether the Bishops palleis be sāctuary. Sūma Rosella, in the title Emunitas para. 24.

Item, whether the dignitie of the bishop, or Priesthood discharge bondage. Summa Rosella in the title Episcopus, in principio.

Item, whether a clerke is bound to pay any Impositions, or Tallages, for his patrimonie or otherwise. Summa Rosella in the title Excommunicatio 1. diuisione oct. par. 4. & 5. & 6. & diuisione nona, para. 1.

Item, if it were ordained by Statute, that if a man sell &c. he shal giue to the king ꝙ. ō. whether a clerke be bound to giue it if he sell of his prebend. Summa Rosella, in the title Excōmunicatio 1. diuisione nona, para. 3.

Item, if it be ordained by statute, that there shall not bee laid vpon a dead person, but such a certaine cloth, or thus many tapers, or candels

dels, whether the statut be good, & it is left for a question. Sūma Rosella in the title Excommunicatio 1, diuisione 18. par. 8. in Fine.

Itē, if a man make a lease of a Mill for terme of yeres, & it is agréed that the lessée shall grind the lessor tolle frée during the term, after ẏ lessor is made an earle or a duke, & hath greater houshold thā before, whether the lessée be bound there &c. Sūma Rosel. in the title Familia, pa. 5.

Item, if a master will not pay his seruants wages, that hath serued him faithfully, whether that seruaunt may take secretly asmuch goods of the masters &c. & if he do, whether hee be bound to restitution. Summa Rosella, in the title Familia, par. 6.

Item, things immoueable of the church may not be giuen. Sūma Rosella, in the title Feodum, parag. 1. And see there in principio what Feodum is.

Item, whether the sons bastards, & the sons lawfully begotten shall inherite together. Summa Rosella, in the title Filius, par. 1.

Item, whether father and mother may succéed to their bastards, Sūma Rosella, in the title Filius, par. 4.

Item, whether the father may leaue any of his goods to his bastards, Sūma Rosella in the title Filius, para. 5. And Summa Rosella in the title Societas, par. 23.

Item, whether the offence of the father shall hurt the son in temporal things. Summa Rosella in the title Filius.

Item, if a man giue all his lands and goods to his childrē, whether a bastard shall haue any

part, Summa Roſella, in the title filius para. 22.

Item, to whom treaſure found belongeth, Sūma Roſella, in the title furtum para. 11.

Item, if a dœre, or other wild beaſt that is ſo ſore hurt þ he may bee taken, commeth into anoſ ther mans ground, whether it bee his that oſweth the ground, or his that ſtrake him, Summa Roſella in the title furtum, para. 13.

Item, whether theft be in a little thing aſwel as in a great thing. Summa Roſella, in the title furtum, para. 18.

Item, what pain a thœfe ſhall haue, Summa Roſella in the title furtum Parag. 22.

Item, that if gœds of dead men goe to the heires, & that of damned men, s. De terris, Summa Roſella, in the title Hęreditas Para. 1.

Item, whether a man ſhall be ſaid guiltie of murther by comunādement, counſell, or aſſent, Summa Roſella in þ title Homicidium 2. per totum, & like matter is Homicidiū 4. in principio, and in diuers other caſes.

Item, a man maketh a pꝛiuie contract with a womā, & after hath a child by her, & after marieth another woman, and hath a child, ſhe not knowing the firſt contract, which of the chilꝺꝛen ſhalbe his heire. Summa Roſella in the title Illegitimus para. 4.

Item, whether the Pope may legitimate one to tempoꝛal things, & to ſucceed, Summa Roſella in the title Illegitimus para.

Item, if gœds be found that were left of the oẅner as foꝛſaken, who hath right to them. Summa Roſella in the title Inuenta para. 2. And like Sūma Roſella in the title furtum, para. 17.

And

And thus I make an end of these questions: & because thou desirest me in the 31. Chapter, to shew thee somwhat, where ignorance excuseth in the Law of the realme, & where not, I will answer somewhat to thy question, and so commit thee to God.

¶ Where ignorance of the Law excuseth in the laws of England, and where not.

Cap. 46.

IGnorance in ỹ law (though it be invincible) doth not excuse as to ỹ law but in few cases: for euerie man is bound at his perill to take knowledge what ỹ law of the realm is, aswel ỹ law made by statute as the cõmon law, but ignorãce of the deed, which may be called the ignorance of the truth of the deed, may excuse in many cases. D. I put case that a statute penall be made, & it is enacted that the statute shall be proclaimed by such a day in euerie shire, & it is not proclaimed before the day, & after the day a man offends against the statute, shall hee run in the penalty? S. I think yea, if there be no farther words in the statute to help him, that is to say, that if the proclamation bee not made, ỹ no mã shalbe boũd by ỹ statute, & the cause is this: there is no statute made in this realme, but by the assent of the lords spiritual & tẽporal, and of all the cõmons, that is to say, by the knights of the shire, citizens, and burgesses that be chosen by assent of the commons, which in the parliament represent the estate of the whole cõmõs:

And euery statute there made, is of as strong effect in the Law, as if all the commons were there present personally at the making thereof: and like as there needed no proclamation, if all were there present in their owne person, so the law presumeth there needeth no proclamation, when it is made by their authoritie, & thē whē it is enacted, that it shall be proclaimed &c. that is but of the fauours of the makers of the statute, & not of necessitie: and it cannot therfore be taken, that their intent was that it should bee void if it were not proclaimed. Neuertheless some be of opinion, that if a man before the day appointed for the proclamation offend the statute, that he should not in that case be punished, for they say, that the intent of the makers of ȳ statute shall be taken to be, that none should be punished before the day, which is a doubt to some other: But admit it be as they say, that he shall be excused, yet hee is not excused by the ignorance of the Law, but because the intent of the makers excuseth him. D. It is enacted in ȳ 7 yeare of R 2. cap. 6. that euerie Shertie shall proclaim the statute of Winchester three times euery yere, in euerie market towne, to thintent the offendors shal not be excused by ignorance, & it semeth by those words, that if no Proclamation be made, that the offendor may be excused by ignorance. St. Some take the intent of that statute to be, that the people by that Proclamation should haue knowledge of the Statute of Winchester, to the intent, that the forfeiture therein may be taken as well in conscience as in law: and some take the statute to bee

of

of such effect as thou speakest of, that is to say, that no forfeiture should grow vpon the statut of Winchester against them ỹ were ignorant, but proclamation were made according to the said statut of Richard. And if it be so takē, the statute of Winchester is of small effect against most part of the people, for certain it is that the said proclamation is not made: but admit it be as they say, then they that be ignorant be excused by ỹ sayd particuler statute, specially made in that case, and not by the generall rules of the law: and sometime in diuers statutes Penals, they that be ignorant be excused by the selfe statute, as it is vpon the statute of Richard the 2. the 13 pere, the 3. statute, and the last Chap. where it is enacted, that if any person take a benefice by prouision that he shall be banished ỹ realme & forfeit all his goods, and that if he be in the Realme, he auoid within 6. weekes after he hath accepted it, and that none shall receiue him ỹ is so banished after the said 6. weeks vpon like forfeiture if he haue knowledge: and so he that hath no knowledge is excused by ỹ expresse words of the statute. And in likewise he that offendeth against Mag. cha. is not excommenged but he haue knowledge that it is prohibit that he doth. For they be onely excommenged by the sentence called Sétentia lata sup cartas, that doe it willingly, or that doe it by ignorance, & correct not themselues within 15. dayes after they haue warning. And sometime they that be ignorant of a Statute be excused from the penalty of the statute, because it shalbe taken that the intent of the makers of the sta-

tute was, that none should be bound but they that haue knowledge: but that any man shalbe discharged in the law by ignorance of the law only for that he is ignorant, I know few cases except it might be applied to infants that be in their infancie, & within yeres of discretiō, for if ignorance of the law should excuse in the law, many offendors would pretend ignorance. Do. Shall an infant that hath discretion, & knoweth good frō euill, be punished by a penal statute that he is ignorant in? S. If the statute be, that for the offence hee should haue corporall payne, I thinke he shall be excused and haue no corporall payne: but I suppose that that is not for the ignorance, for though he knew the statute, & willingly offended, yet I thinke he shall haue no corporall payne: As where he plead Iointenancie by deed that is found against him, or if hee plead a Record in Assise, and faileth of it at his day: but that is because the law presumeth that it was not the intent of the makers of the Statute, that he should haue that punishment: but if he be of yeres of discretion to know good from euill, whether he shall then forfeit the penaltie of a penal statute it is more doubt, for it is commonly holden, that if an infant had not bin excepted in the stat. of foreiudgement, that the foreiudgement should haue bound him, & so shall his cesser, & his leuying of a crosse against the statute, or if he be a gardein of a prison and suffer a prisoner escape, he shal pay the debt because the statutes bee generall, & if he should by the statutes be bound wīn age, like reason will ẏ hee may by a statute penall leese his goods. D.

If

If an infant doe a murther or a felonie at such yeares as he hath discretion to know the law, shall he not haue the punishment of the law as one of ful age? S. I think yes, but that is by an old Maxime of the law for eschewing of murders & felonies, & so it is of a trespas: but these cases run not vpō the ground of ignorāce, but with what acts Infants shalbe punishable or not punishable, for the tenderneſſe of their age, though they be not ignorant. Do. Be not yet Knights & noblemen that are bound most properly to set their studie to acts of chiualrie, for defence of the realme, & husbandmen that must vse tillage & husbandry for the sustenāce of the comminaltie, & that may not by reason of their labour put themselues to know the Law, discharged by ignorance of the law? S. No verily, for sith all were makers of the statute, the law presumeth that al haue knowledge of that that they make, as it is sayd before: and as they be bound at their perill to take knowledge of the statute that they make, so be al them that come after thē. And as for knights and other nobles of the Realme, me seēmeth that they should be bound to take knowledge of the law aswell as any other within the realme, except them that giue themselues to the studie & exercise of the law, & except spirituall iudges, ỹ in many cases be bound to take knowledge of the law of the realm, as is said before in Cap. 25. For though they be bound to acts of Chiualrie, for the defence of the Realme, yet they be bound also to the acts of Iustice, & that (it seēmeth) more thā other be by reason of their great possessiōs and

authoritie: and for the well ordering of the tenants seruants, & neighbors, that many times haue need of their helpe, & also because they be oft called to be of the Kings councell, & to ỹ generall counsails of the realm, wher their counsel is right expedient & necessary for the cõmon wealth: and therefore if the noble men of this realme would see their children brought vp in such maner, that they should haue learning and knowledge, more than they haue cõmonly vsed to haue in time past, specially of the grounds & principles of the law of the realm wherin they be inherit (though they had not the high cunning of the whole body of ỹ law, but after such maner as M. Fortescue in his booke that he entitleth the Booke de laudibus legũ Angliæ, & diuertiseth the Prince to haue knowledge of the lawes of this realme) I suppose it would be a great help hereafter to the ministration of Iustice of this realme, a great suerty for himselfe, and a right great gladnesse to all the people: for certain it is, the more part of the people would more gladly heare ỹ their rulers & gouernors entended to order them with wisdom and Iustice, than with power & great retinues. But ignorance of the deed many times excuseth in the Lawes of England, & I shall shortly touch some cases therof to shew where it shall excuse, and where it shall not excuse, & then the reader may adde to it after his pleasure & as hee shall thinke to be conuenient.

¶ Certaine cases and grounds where ignorance of the deed excuseth in the laws of England, and where not.

Cap.

Cap. 47.

If a man buy a horſe in open market of him that in right hath no propertie in him, not knowing but that he hath right, he hath good tytle and right to the horſe, and the ignorance ſhall excuſe him. But if he had bought him out of the open Market, or if he had knowne that the ſeller had no right, the buying in open market had not excuſed him. Alſo if a man retaine another mans ſeruant not knowing that he is retayned with him, the ignorance excuſeth him both of the offence that was at ꝑ common law againſt the Maxime that prohibited ſuch retaining of another mans ſeruant, and alſo againſt the ſtatute 33. Edw. 3. whereby it is prohibit vpon pain of impriſonment, that none ſhall retayne no ſeruant that departeth within his term, without licence or reaſonable cauſe: for it hath been alway taken, that ꝯ intent of the makers of the ſaid Statute was, that they that were ignorant of the firſt retaynour, ſhould not run in any penaltie of the ſtatute. And the ſame Law is of him that retayneth one that is Ward to another, not knowing that he is his ward. And if homage be due, and the Tenant after that the homage is due maketh a Feoffement, and after the Lord not knowing of the feoffement diſtrayneth for the homage, in that caſe that ignorance ſhall excuſe him of his damages in a Replevin though he cannot awow for the homage: but if he had knowne of the feoffement, he ſhould haue peelded damages for the wrongfull taking. Alſo if a man be bound in an Obligation that he ſhall

repaire

repaire the houſes of him that he is bound to
by ſuch a certaine time, as oft as nēd ſhall re-
quire, & after the houſes haue nēd to be repay-
red, but he that is bound knoweth it not, that
ignorance ſhal not excuſe him, for he hath bōd
himſelfe to it, and ſo he muſt take knowledge
at his perill: But if the condition had bin that
hē ſhould repayre ſuch houſes as he to whom
hē was bound ſhould aſſigne, & after he aſſig-
neth certaine houſes to be repaired, but hē that
is bōd hath no knowledge of that aſſignemēt,
that ignorance ſhall excuſe him in the law, for
he hath not bound himſelfe to no reparation in
certaine, but to ſuch as the party will aſſigne, &
if he aſſigne none, he is bound to none: & there-
fore ſith he that ſhould make the aſſignement
is prime to the deed, he is bound to giue notice
of his own aſſignement: but if the aſſignement
had bin appointed to a ſtranger, then the obli-
gor muſt haue taken knowledge of the aſſigne-
ment at his peril. Alſo if a man buy Lands
whereunto another hath title which the buyer
knoweth not, that ignorance excuſeth him not
in the law no more than it doth of goods. Alſo
if a ſeruant come with his maſters horſe to a
Towne that by cuſtome may attach goods for
debt, & vpon a plaint againſt the ſeruant, an of-
ficer of the towne by information of the partie
attacheth the Maſters horſe, thinking that it
were the ſeruants horſe, that ignorance excu-
ſeth him not: for when a man will do an act as
to enter into Land, ſeiſe goods, take a diſtreſſe,
or ſuch other, he muſt by the law at his peril
ſee that that hee doth bee lawfully done, as in
the

the case before rehearsed. And in likewise if a Sherife by a Replevin deliuer other beastes thā were distrained, though the party that distrayned shew him they were the same beasts, yet an action of trespas lyeth against him, and ignorance shall not excuse him: for he shall be compelled by the law, as al officers commonly be, to execute the Kings writ at his perill, according to the tenor of it, and to see that the act that he doth be lawfully done. But otherwise it is after some men, if vpon a Summons in a Præcipe quod reddat, the Sherife by infōrmation of the demandant, summoneth the tenant in another mans Lands, thinking it for the tenants land, there they say he shalbe excused: for in that case he doth not seise the Land, ne take possession in the lād, but only doth summon the tenant vpon the land, & the writ commandeth him not that he shall summon the tenant vpon his owne land, but generally that he shall summon him, & knoweth not in what Land, & then by an old Maxime in the law it is taken, that he shall summon him vpon the land in demand: and therefore though he mistake the land & be ignorant of it, yet if the Demaundant informe him that that is the land that he demaundeth, that sufficeth to the Sherife as to his entry for the summoning as they say, though it be not the tenants. And here I make an end of these questions for this time. Do. I pray thee yet or we depart take a little more paine in my desire. S. what is that? D. That thou wouldest shew me thy mind in diuers cases of the Law of the realm, which (as me seemeth) stād not so clerly

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with conſcience as they ſhould doe. And therefore I would gladly heare thy conceit therein, how they may ſtand with conſcience. S. Put the caſes, and I ſhall with god will ſay as I thinke to them.

¶ The firſt queſtion of the Doctor, how the law of England may be ſaid reaſonable, that prohibiteth them that be arraigned vpon an Indictment of felony or murther, to haue counſell.

Cap. 48.

ME thinketh that the law in that poynt is very good and indifferent, taking the law therein as it is. D. Why, what is the law in this poynt? S. The law is as thou ſaiſt, that he ſhall haue no counſell: but then the Law is farther, that in all things that pertaine to the order of pleading, the Iudges ſhall ſo inſtruct him and order him, that he ſhall runne into no ieopardie by his miſpleding: As if he will plede that he neuer knew the man that was ſlain, or that he had neuer a peny worth of the goods that is ſuppoſed that hee ſhould ſteale, in theſe caſes the Iudges are bound in conſcience to informe him that he muſt take the generall iſſue, and plead that he is not guiltie: for though they be ſet to be indifferent betweene the King and the partie as to the partie and to the principall matter, as they be in all other matters, yet they be in this caſe to ſee that the partie take no hurt in forme of pleading in ſuch matters,

ters, as he shall shew to be the truth of the matter, and that is a great fauour of the law: for in appeale, though the Justices of fauor wil most commonly helpe forth the partie, and sometime his Counsell also in the forme of pleading, as they do also many times in common plees, yet they might in those cases if they would bid the partie, and his Counsell pleade at their perill. But they may not doe so with conscience vpon indictments as me seemeth: for it were a great vnreasonablenes in the Law, if it should prohibite him that standeth in ieopardie of his life, that he should haue no counsell, & then to driue him to pleade after the strait rules, and formalities of the law that he knoweth not. D. But what if hee bee knowne for a common offendor, or that the Judges know by examination, or by an euident presumption that hee is guilty, & he asketh Sanctuarie, or pleadeth misnosmer, or hath some Record to pleade, that hee cannot pleade after the forme, May not the Judges in such cases bid him plead at his perill? St. I suppose they may not, for though hee be a common offendor, or that he bee guilty, yet he ought to haue that the Law gineth him, and that hee shall haue the effect of his plees, and of his matters entred after the forme of the Law: and also sometime a man by examination, and by witnesse may appeare guiltie that is not: and in likewise there may be a vehement suspition that hee is guiltie, and yet hee is not guiltie, and therefore for such suspition, or vehement presumptions me thinketh a mā may not with conscience bee put from that he ought to haue

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by the law, ne yet although ꝯ Iudges knew it of their owne knowledge: but if it were in appeale, I suppose that the Iudges might doe therein as they should thinke best to bee done in conscience: for there is no Law that bindeth them to instruct him (but as they doe commonly to the parties of fauor in all other cases) but they may if they will bid them plead at their perill by aduise of their counsel: and if the appellee be poore, and haue no counsel, the court must assigne him counsell if hee aske it, as they must doe in all other places, & that mee thinketh they are bound to doe in conscience, though the appellee were neuer so great an offendor, & though the Iudges knew neuer so certainely that hee were guiltie, for the law bindeth them to do it. And so me thinketh that there is great diuersitie betweene an indictment & an appeale. And the reason why the Law prohibiteth not counsell in appeale as it doth in an indictment, I suppose is this: There is no appeale brought, but that of common presumption the appellant hath great malice against the appellee: as when the appeale is brought by the wife of the death of her husband, or by the sonne of the death of his father: or that an appeale of robberie is brought for stealing of goods. And therefore if the Iudges should in those cases shew thēselues to instruct the appellees, the appellants would grutch & thinke them partiall, and therefore as well for the indemnitie of the court, as of the appellee in case that hee bee not guiltie, the Law suffereth the appellee to haue counsel: but when that a man is indicted at the

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Kings suit, the King intendeth nothing but iustice with fauour, & that is to the rest and quietnes of his faithfull subiects, & to put away misdoers among them charitably: and therfore he will be contented that his Iustices shall helpe forth the offendors according to the trueth, as far as reasō and iustice may suffer. And as the King will be contented therin, it is to presume that the counsell will be contented, and so there is no daunger thereby, neither to the Court ne to the partie. And as I suppose for this reason it began that they should haue no counsel vpon indictments, & that hath so long continued that it is now growne into a custom, & into a maxime of the law, ỹ they shall none haue. D. But if the Iudges knew of their owne knowledge that the indictée is guiltie, and then he pleadeth Autrefoismer, or a Record that hee was autrefoits arraigned, and acquite of the same murther, or felony, and the Iudges of their owne knowledge know that the plee is vntrue, may they not then bid him plead at his perill? S. I think yes, but if they know of their own knowledge that he were guilty of the murther or felony, but that the plea was vntrue they knew not, but by coniecture or information, I think they might not then bid him plead at his perill.

¶ The second question of the Doctor, whether warrantie of the younger brother, that is taken as heire, because it is not knowne but that the eldest brother is dead, be in conscience a bar vnto the eldest brother, as it is in the law.

Cap.

Cap. 49.

A Man seised of lands in fée hath issue two sons, the eldest son goeth beyond the sea, and because a common voice is that hee is dead, the yonger brother is taken for heire, ỹ father dyeth, ỹ yonger brother entreth as heire, & alieneth the land with a warrantie, and dieth without any heire of his body, and after the elder brother commeth againe, and claimeth the land as heire to his father, whether shall he be barred by that warrantie in conscięce as he is in the law? Stu. It is a Maxime in the Law, that the eldest brother shall in that case be barred, and that Maxime is taken to bee of as strong effect in the Law, as if it were ordained by statute to bee a bar. And it is as old a law that such a warrantie shall bar the heire, as it is that the inheritance of the father shall onely discend to the eldest son. And sith the Law so is, why then should not conscience follow the Law, as well as in doth in that point, that the eldest son shall haue the land. Do. For there appeareth no reasonable cause whereupon the Maxime might haue a lawfull beginning: For what reason is it that the warrantie of an auncestor that hath no right to land, should bar him that hath right? And if it were ordeined by Statute, that one man should haue another mans land, and no cause is expressed why hee should haue it, in that case though hee might hold the land by force of that statute, yet he could not hold it in conscięce, without there were

were a cause why he should haue it, & these cases bee not like as me seemeth to the forfeiture of goods by an Outlawrie, for I will agree for this time, that that forfeiture standeth with conscience, because it is ordained for ministration of iustice, but I cannot perceiue any such cause here: and therefore me thinketh that this case is like to the Maxime, that was at the cõmon Law of wrecke of the Sea, that is to say, that if a mans goods had bin wrecked vpõ the sea, that the goods should haue bin immediatly forfeited to the King. And it is holden by all Doctors that the Law is against conscience, except in certain cases that were too long to rehearse now. And it was ordained by the statut of Westminster the 1. that if a Dogge or Cat come aliue to the land, that the owner, if hee proue the goods within a yeare and a day to be his, shall haue them, whereby the said Law of wrecks of the sea, is made more sufferable thã it was before: and some thinke in this case that this warranty is no bar in conscience, though it be a barre in the law. S. I pray thee keep that case of wrecke of the sea in thy remembrance, and put it hereafter, as one of thy questions, & thereupon shew me thy further mind therein, and I shal with good will shew thee my mind: & as to this case that wee be in now, mee thinketh the Maxime whereby the warranty shalbe a barre, is good and reasonable, for it seemeth not against reason that a man shal be bound, as to temporall things, by the act of his auncestor to whom hee is heire: for like as by the law it is ordained, that hee shall haue aduantage by

the ſame auncеſtor, and haue all his lands by diſcent if he haue any right, ſo it ſeemeth that it is not vnreaſonable, though the law for the priuitie of blood that is betweene them ſuffer him to haue a diſaduantage by the ſame auncеſtor: but if the Maxime were, that if any of his auncеſtours, though he were not heire to him, made ſuch a warrantie, that it ſhould be a bar, I thinke that Maxim were againſt conſcience, for in that caſe there were no ground, nor conſideration to proue how the ſaid Maxime ſhould haue a lawfull beginning, wherefore it were to bee taken as a Maxime againſt the law of reaſon: but me thinketh it is otherwiſe in this caſe, for the reaſon that I haue made before. D. If the father bind him and his heirs to the payment of a debt and dye, in that caſe the Sonne ſhall not be bound to pay the debt, vnles he haue aſſets by diſcēt from his father. And ſo I would agree, that if this man haue aſſets by diſcent from the auncеſtor that made the warrantie, that he ſhould haue bin barred: but els me thinketh it ſhould ſtand hardly with conſcience that it ſhould bee a barre. St. In that caſe of the obligation, the law is as thou ſaiſt, and the cauſe is, for that the Maxime of the law in that caſe is none other, but that he ſhall bee charged if hee haue aſſets by diſcent: but if the Maxime had beene generall, that the heire ſhould bee bound in that caſe without any aſſets, or if it were ordained by ſtatute, that it ſhould bee ſo, I thinke that both the Maxime and the ſtatute ſhould well ſtand with conſcience. And like law is where a man is vouched

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as heire, he may enter as he that hath nothing by diſcent, but where hee claimeth the land in his owne right, there the warranty of his anceſtor ſhall be a bar to him, though hee haue no aſſets from the ſame auncеſtor, & though it bee ſaid in Ezchiel Cap. 18. That the ſonne ſhal not beare the wickedneſſe of the father, that is vnderſtood ſpiritually. But as to temporall goods the opinion of Doctors is, that the ſonne ſometime may beare the offence of his Father. Do. Now that I haue heard thy mind in this caſe, I will take aduiſement therein till a better leaſure, and will now proceed to another queſtion. Stu. I pray thee doe as thou ſaiſt, and I ſhall with good will make anſwer therto aſwell as I can.

¶ The 3. queſtion of the Doctor; If a man procure a collaterall warrantie, to extinct a right that hee knoweth another man hath to land, whether it bee a barre in conſcience as it is in the Law, or not.

Cap. 50.

A Man is diſſeiſed of certaine land, ꝯ diſſeiſor ſelleth the land &c. ꝯ alienee knowing of the diſſeiſin, obtaineth a releaſe with a warrãty of an anceſtor collateral to ꝯ dieſſiſee, that knoweth alſo the right of the diſſeiſee, that auncеſtor collaterall dyeth, after whoſe death the warranty diſcendeth vpon the diſſeiſee, whether may the alienee in ꝯ caſe hold the land

in conſcience as he may by the law. S. With the warrantie is diſcended vpon him, whereby hee is barred in the law mee thinketh that hee ſhall alſo be barred in conſcience, and that this caſe is like to the caſe in the next Cha. before wherin I haue ſaid that (as me thinketh) it is a bar in conſcience. D. Though it might be taken for a bar in conſcience in that caſe, yet mee thinketh in this caſe it cannot: for in that caſe the ponger brother entred as heire, knowing none other but that hee was heire of right, and after when he ſold the land, the buyer knew not but that hee that ſold it had good right to ſell it, and ſo he was ignorant of the title of the eldeſt brother, & that ignorance came by the default and abſence of himſelfe, that was the eldeſt brother. But in this caſe aſwell the buyer, as he y made the collateral warranty, knew the right of the diſſeiſee, and did that they could to extinct the right, and ſo they did as they would not ſhould haue been done to them: & ſo it ſeemeth y hee that hath the land may not with conſcience keepe it. St. Though it be as thou ſaieſt that all they offended in obtaining of the ſaid collaterall warranty, yet ſuch offence is not to be conſidered in the law, but it bee in verie ſpecial caſes: for if ſuch alleagings ſhould be accepted in the law, releaſes, and other writings ſhould be of ſmall effect, and vpon euerie light ſurmiſe, all writings might come in triall, whether they were made with conſcience or not. Therefore to auoid that inconuenience, the law will driue the partie to anſwere onely whether it bee his deed or not, and not whether the deed were

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made with conſcience or againſt conſcience, & though the partie may be at a miſchiefe thereby, yet the law will rather ſuffer the miſchiefe than the ſaid inconuenience. And like law is if a woman Couert for dread of her huſband by compulſion of him leuie a Fine, yet the woman after her huſbands death, ſhall not be admitted to ſhew that matter in auoyding of the Fine, for the inconuenience that might follow thereupon. And after the opinion of many men, there is no remedy in theſe caſes in the Chancery: for they ſay that where the common Law in caſes concerning inheritaunce putteth the partie from any auerment for eſchewing of an inconuenience that might follow of it among the people, that if the ſame inconuenience ſhold follow in the Chauncerie if the ſame matter ſhould be pleded there, that no Subpena ſhould lie in ſuch caſes, & ſo it is in the caſes before rehearſed: For almuch vexation, delay, coſts and expences might grow to the party if he ſhould be put to anſwer to ſuch auerments in the Chancerie, as if he were put to anſwer to thē at the common law: and therefore they thinke that no Subpena lyeth in the ſaid caſes ne in other like vnto thē. Neuertheles I do not take it that their opinion is that he that bought the land in this caſe may with good cōſcience hold the Land, becauſe he ſhall not bee compelled by no law to reſtore it, but that he is in conſcience and by the law of reaſon bound to reſtore it or otherwiſe to recompence the partie, ſo as hee ſhall be contented, and I ſuppoſe verily it is ſo if he will kéepe his ſoule out of perill and

danger. And after some men to these cases may be resembled the case of a fine with nonclaime that is remẽbred before in the 14. Cha. of this booke, where a man knowing another to haue right to certain land, causeth a fine to be leuyed therof with Proclamation, & the other suffreth yeres to passe without claime, in that case he hath no remedie neither by common Law, nor by Subpena, & that yet he that leuied the fine, is boũd to restore the land in conscience. And me thinketh I could right wel agree that it should be so in this case, and that specially, because the partie himselfe knoweth perfectly that the said collaterall warrantie was obtained by couin & against conscience.

¶ The fourth question of the Doctour is of the wrecke of the Sea.

Cap. 41.

I Pray thee let mee now heare thy mind how the law of England concerning goods that be wrecked vpon the sea may stand with cõscience, for I am in great doubt of it. S. I pray thee let me first heare thine opinion what thou thinkest therein. D. The statute of West. the 1. that speaketh of wrecks is, that if any man, dog or cat, come aliue into the land out of the Ship or Barge, that it shall not bee iudged for wreck, so that if the partie to whom the goods belõg come within a yeare and a day and proue them to be his, that he shall haue thẽ or els that they shal remain to the King. And me thinketh that

that the sayd statute standeth not with conscience, for there is no lawful cause why the partie ought to forfeit his goods, ne ȳ the King or Lords ought to haue thē, for there is no cause of forfeiture in the partie, but rather a cause of sorrow & heauines: And so the law seemeth to add sorrow vpō sorrow: And therefore Doctors hold commonly, that he that hath such goods is bound to restitution, and that no custome may help, for they say it is against the cōmandemēt of God, Leu. 19. where it is commanded, that a man should loue his neighbour as himselfe, and that they say he doth not, that taketh away his neighbours goods: but they agree that if any man haue cost and labor for the sauing of such goods wrecked, specially for such goods as would perish if they lay still in the water, as Suger, Paper, Salt, Weale, and such other, that he ought to be allowed for his costs & labour, but he must restore the goods, except he could not saue them without putting his life in ieopardie for them, and then if he put his life in such ieopardie, & the owner by cōmon presumption had had no way to haue saued them, then it is most commonly holden, that he may kéepe the goods in conscience: but of other goods that would not so lightly perish, but that the owner might of common presumption saue them himselfe, or that might be saued without any perill of life, the takers of them be bound to restitution to the owner, whether he come within the yeare or after the yeare.

And me thinketh this case is somewhat like to a case that I shall put: if there were a Law

and a custome in this realm, or if it were ordeined by statute, that if any alien came through the realme in pilgrimage, and dyed, that al his goods should be forfeit, that Law should be against conscience, for there is no cause reasonable why the sayd goods should be forfeit: And no more me thinketh there is of wrecke.

S. There be diuers cases where a mã shal leese his goods & no default in him: as where beasts stray away from a man and they be taken vp and proclaimed, and the owner hath not heard of them within the yeare and the day, though he made sufficient diligence to haue heard of them, yet the goods be forfeited and no default in him: & so it is where a man killeth another with the sword of Lat Stile, the sword shall be forfeit as a Deodand, & yet no default is in the owner: and so me thinketh it may be in this case, and that sith the common law, before the said statute, was, that the goods wrecked vpon the sea, shall be forfeit to the king, that they be also forfeit now after the Statute, except they be saued by following the statute, for the Law must needs reduce the propertie of all goods to some man, and when the goods be wrecked, it seemeth the propertie is in no man: but admit that the propertie remayne stil in the owner, then if the owner percase would neuer clayme, then it should not be knowne who ought to take them: and so might they be destroyed, and no profit come of them: wherefore me thinketh it reasonable, that the Law shall appoint who ought to haue them, and that hath the law appointed to the King as Soueraigne and head

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ouer the people. D. In the cases that thou hast put before of the ſtray and Deodand, there be conſiderations why they be forfeit, but it is not ſo here: and me thinketh that in this caſe, it were not vnreaſonable that the Law would ſuffer any man that would take them, to take and keepe them to the vſe of the owner, ſauing his reaſonable expences, and this mee thinketh were more reaſonable law, than to pull ꝑ propertie out of the owner without cauſe. But if a man in the ſea caſt his goods out of the ſhip, as forſake, there Doctors hold that euerie man may take them lawfully that will: But otherwiſe it is (as they ſay) if he throw them out for feare that they ſhould ouercharge the ſhip.

S. There is no ſuch Law in this Realme of goods forſaken: For though a man weiue the poſſeſſion of his goods, and ſaith he forſaketh them, yet by the Law of the Realme the propertie remayneth ſtill in him, and he may ſeiſe them after when he will: And if any man in the meane time put the goods in ſafegard to the vſe of the owner, I thinke he doth lawfully and that he ſhall be allowed for his reaſonable expences in that behalfe, as he ſhall be of goods found, but he ſhall haue no propertie in them, no more than in goods found. And I would agree, that if a man preſcribe, that if he find any goods within his manor, that he ſhould haue them as his owne, that that preſcription were void: for there is no conſideration how the preſcription might haue a lawfull beginning, but in this caſe me thinketh there is. D. What is that? S. It is this, The King of the old cuſtome

Some of the realm, as the Lord of the narrow sea is bound as it is said to scower the Sea of the Pirats & petit robbers of the sea. And so it is read of the noble King Saint Edgar, that he would twise in the yere scower the sea of such pirats: but I meane not thereby that the King is bound to conduct his Merchants vpon the sea against all outward enemies, but that he is bound onely to put away such Pirats and petit robbers. And because that cannot be done without great charge, it is not vnreasonable if he haue such goods as be wrecked vpon the Sea toward the charge. D. Upon that reason I will take a respit till another time.

¶ The fift question of the Doctor, whether it stand with conscience to prohibit a Iurie of meat and drinke till they be agreed.

Cap. 52.

IF one of the xij. men of an enquest know the verie truth of his owne knowledge, and instructeth his fellows therof, & they will in no wise giue credence to him, & thereupon because meat & drinke is prohibited them, he is driuen to that poynt, that either he must assent to them and giue their verdict against his own knowledge, and against his owne conscience, or dye for lacke of meat: how may the law then stand with conscience that will driue an innocent to that extremitie, to be either forsworne, or to be famished & dye for lacke of meat. S. I take not the law of the realme to be, that the Iurie after they

they be ſworne may not eat nor drinke till they be agréed of the verdict: but truth it is there is a Maxime, and an old cuſtome in the law, that they ſhall not eat nor drinke after they bee ſworne till they haue giuen their verdict without the aſſent & licence of the Juſtices: & that is ordeined by the law for eſchewing of diuers inconueniences that might follow thereupon, and that ſpecially if they ſhould eat or drinke at the coſts of the parties, and therefore if they doe the contrarie, it may be laid in arreſt of the iudgement: But with the aſſent of the Juſtices they may both eat & drinke; As if any of the Jurors fall ſicke before they be agréed of their verdict ſo ſore that he may not commune of the verdict, then by the aſſent of the Juſtices he may haue meat & drinke, and alſo ſuch other things as be neceſſarie for him and his fellowes alſo at their owne coſtes, or at the indifferent coſtes of the parties if they ſo agrée, or by the aſſent of the Juſtices, may both eat and drink: and therefore if the caſe happen that thou now ſpeakeſt of, and that the Jurie can in no wiſe agree in their verdict, and that appeareth to the Juſtices by examination, the Juſtices may in that caſe ſuffer them to haue both meat and drinke for a time to ſée whether they will agrée, and if they will in no wiſe agrée, I think that the Juſtices may ſée ſuch order in the matter, as ſhall ſeeme to them by their diſcretion to ſtand with reaſon and conſcience, by awarding of a new Enqueſt, & by ſetting fine vpon them that they ſhal find in default, or otherwiſe as they ſhall think beſt by their diſcretion, like

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as they may doe if one of the Iurie dye before verdict, or if any other like casualties fall in that behalfe. But what the Iustices ought to doe in this case that thou hast put in their discretion, I will not treat of at this time.

¶ The 6. question of the Doctor, whether the colors that be giuen at the common law in Assises, actions of trespas, & diuers other actions, stand with conscience, because they be most commonly feined, and be not true.

Cap. 53.

I Pray thee let me heare thy mind to what intent such colors be giuen, and sith they be commonly vntrue, how they may stand with conscience? S. The cause why such colors be giuen is this: there is a Maxime and a ground of the Law of England, that if the defendant or tenant in any actiō plead a plee that amounteth to the generall issue, that he shalbe compelled to the generall issue, and if he will not, he shalbe condemned for lacke of answer, and the generall issue in Assise is, that he that is named the disseisor hath done no wrong, nor no disseisin. And in a writ of Entry in the nature of Assise the generall issue is, that he disseised him not. And in an action of Trespas that he is not guiltie, & so euery action hath his generall issue assigned by the Law, and the Tenant must of necessitie either take the generall issue, or plead some plee in abatement of the writ, to the iurisdiction, to the partie, or else some bar or some matter by way of conclusion. And therefore if

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I. at S. inkele H. Hart of land, and a stranger bringeth an assise against the said H. Hart, for the land, whose title hee knoweth not: In this case if hee should bee compelled to plead to the point of the assise, that is to say, that hee hath done no wrong ne no disseisin, the mater should be put in the mouths of 12. lay men, which bee not learned in the law, and therefore better it is that the law bee so ordered, that it be put in the determination of the Judges, than of lay men. And if the said H. Hart in the case before rehearsed, would plead in barre of the assise that Io. at Stile was seised, and enfeoffed him, by force whereof he entred and asked iudgement, if that Assise should lye against him, that plee were not good, for it amounteth but to the generall issue: and therefore he shalbe compelled to take the generall issue, or els the Assise shall bee awarded against him for lack of answere. And therefore to the intent the matter may be shewed and pleaded before the Judges, rather than before the Jurie, the tenaunts vse to give the plaintife a colour, that is to say, a colour of action whereby it shall appeare that it were hurtfull to the tenãt to put that matter that he pleadeth to the iudgement of 12. men: & the most cõmon colour that is vsed in such case is this, when he hath pleded that such a man enfeoffed him, as before appeareth, it is vsed that he shall plead farther, & say that the plaintife claiming by a colour of a deed of feoffement made by the said feoffor, before the feoffement made to him where no right passed by the deed, entered, vpon whom hee entred and asked Iudgement if

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the Assise lye against him. In this case because it appeareth to bee a doubt to vnlearned men, whether the land passe by the deed without liuerie or not, therefore the law suffereth the tenaunt to haue that speciall matter to bring the matter to the determination of the Iudges. And in such case the Iudges may not put the tenaunt from the plee, for they knew not as Iudges, but that it is true, & so if any default be, it is in the tenant & not in the Court. And though the trueth bee, that there were no such deed of feoffement made to the plaintife as the tenant pleadeth, yet me thinketh there is no default in the tenant, for hee doth it to a good intent as before appeareth. Do. If ỹ tenant know that the feoffor made no such deed of feoffement to the plaintife, then there is a default in the tenant to plead it: for hee wittingly sayeth against the truth, and it is holden by all doctors that euerie ly is an offence more or lesse, for if it be of malice, and to the hurt of his neighbor, then it is called Mendatiũ pernitiosum, and that is deadly sinne: and if it bee in sport, and to the hurt of no man, nor of custome vsed, ne of pleasure that he hath in lying, then it is veniall sin, and it is called in latin, mendatium iocosum: and if it be to the profit of his neighbour and to the hurt of no man, then it is also veniall sin, and it is called in latin, mendatium officiosum: and though it bee the least of those three, yet it is a veniall sin and would bee eschewed, Stu. Though the midwiues of AEgypt lyed when they had reserued the male children of the Hebrewes, saying to the king Pharao, that

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the Hebrewes had women that were cunning in the same craft, which or they came had reserued the children aliue, where in deed they themselues of pity and of dread of God reserued them, yet Saint Hierome expounded the text following, which saieth, that our Lord therefore gaue them houses, that is to bee vnderstood, that hee gaue them spirituall houses, and that they had therefore eternall reward: and if they sinned by that lye, although it were but venial, yet I cannot see how they should haue therefore eternall reward. And also if a man intending to slea another, aske me where that man is, is it not better for mee to lye, and say, I cannot tell where hee is, though I know it, than to shew where hee is, whereupon murther should follow? Doct. The deed that the Midwiues of Ægypt did in sauing the children, was meritorious, and deserued reward euerlasting (if they beleeued in God) & did good deeds beside, as it is to suppose they did, when they for the loue of God, refused the death of the Innocents: and then though they made a lye after, which was but venial sinne, that could not take from them their reward, for a venial sinne doth not vtterly extinct charitie, but letteth the feruour thereof: and therefore it may well stand with the words of Saint Hierome, that they had for their good deed eternall houses, and yet the lye that they made to be a venial sinne: but neuertheless, if such a lye that is of it selfe but venial, be affirmed with an oth, it is alway mortal, if he knew it be false that he sweareth. And as to the other que-

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queſtion, it is not like to this queſtion that wée haue in hand as me ſéemeth: for ſometime a mã for eſchéwing of the greater euill may doe a leſſe euill, and thẽ the leſſe is no offence in him, and ſo it is in the caſe that thou haſt put, wherin becauſe it is leſſe offence to ſay, hee wotteth not where he is, though he know where he is, than it is to ſhew where hee is, whereupon murther ſhould follow, it is therefore no ſinne to ſay hee wotteth not where he is: for euerie man is bound to loue his neighbour, and if hee ſhew in this caſe where hee is, knowing his death ſhould follow thereupon, it ſéemeth that hee loued him not, ne that hee did not to him as he would be done to: But in the caſe that we be in here, there is no ſuch ſinne eſchewed: For though the partie pleadeth the generall iſſue, the Iurie might find the truth in euerie thing, and therefore in that hee ſaith that the plaintife clauming in by the color of a déed of feoffement, were nought paſſed, entred &c. knowing that there was no ſuch feoffement, it was a lye in him and a veniall ſinne, as mee thinketh. And euerie man is bound to ſuffer a deadly ſinne in his neighbour, rather than a veniall ſinne in himſelfe.

St. Though the Iury vpõ a general iſſue, may find the trueth as thou ſayeſt, yet it is much more dangerous to the iurie to inquire of many points, than to inquire onely of one point. And forasmuch as our Lord hath giuen a cõmãdement to euery man vpon his neighbour: therefore euery man is bound to force almuch as in him is, ẏ by him no occaſion of offence come to his

his neighbor. And for ỹ same cause, ỹ law hath ordeined diuers maximes & principles, whereby issues in ỹ kings court may be ioined vpon one point in certain as nigh as may be, and not generally, least offence might follow thereupon against God, & a hurt also vnto ỹ Iury, wherefore it seemeth that hee loueth not his neighbor as himselfe, ne that he doth not as he would bee done to, that offereth such danger to his neighbor, where he may well & conuemently keepe it from him, if he will follow the order of ỹ law, & it seemeth that hee putteth himselfe wilfully in iopardy that doth it, and it is written Eccle. 3. Qui amat periculum, in illo perebit, that is to say, he that loueth perill, shall perish in it, & he ỹ putteth his neighbor in perill to offend, putteth himselfe in the same, and so should hee doe mee seemeth that would wilfully take the generall issue, where hee might conuemently haue the speciall matter: and furtherinore it is no offẽce in princes and rulers to suffer contracts, and buying and selling in Markets and Faires, though both periurie and deceipt will follow thereupon, because such contracts be necessary for the common wealth: so it seemeth likewise, that there is no default in the partie that pleadeth such a speciall matter to auoyd from his neighbor the daunger of periurie, ne yet in the court though they induce him to it, as they doe sometime for the intent before rehearsed. And in likewise some will say, that if rulers of cities & communalties, sometime for the punishment of felons, murtherers, & such other offendors will (to the intent they would haue them to con-

leſſe the truth) ſay to them that bee ſuſpected that they be informed of ſuch certaine defaults, or miſdemeanors in the offendors, & that they doe to the intent to haue them to confeſſe the truth, that though they were not ſo informed, that yet it is no offence to ſay they were ſo informed, becauſe they do it for the cõmon welth: for if offendors were ſuffered to goe vnpuniſhed, the common wealth would eftſones decay & vtterly periſh.

D. I will take aduiſemẽt vpon thy reaſon in this matter till another ſeaſon, and I will now alke thee another queſtion ſomewhat like vnto this, I pray thee let me heare thy minde therein. St. Let me heare thy queſtion, & I ſhall with good will ſay as I think therein.

¶ The 7. queſtion of the Doctor cõcerning the pleading in Aſſiſe, whereby the tenants vſe ſomtime to plede in ſuch maner that they ſhal confeſſe no Ouſter.

Cap. 54.

IT is commonly vſed as I haue heard ſay that when the tenant in Aſſiſe pleadeth that a ſtranger was ſeiſed and enfeoffed him, and giueth the plaintife a colour in ſuch manner as before appeareth in the xlviij. Chapter, that the tenant many times when hee hath pleaded thus, and the plaintife claiming by a colour of a deed of feoffement made by the ſaid ſtraunger, where nought paſſed by the deed, entred,

and

and that then they vse to say further vpon whom A. B. entred, vpon whom the tenant entred, where in deed the said A. B. neuer entred, ne haply there was neuer no such man: How can this pleding be excused of an vntruth, and what reasonable cause can bee why such a pleding should be suffered against the trueth? St. The cause why that manner of pleding is suffered, is this: If the tenant by his pleding confessed an immediate entry vpon the plaintife, or an immediate putting out of the plaintife, which in French is called an ouster, thē if the title were after found for the plaintife, the tenant by his confession were attainted of the disseisin. And because it may bee, that though the plaintife haue good title to the Land, that yet the tenant is no disseisor: Therefore the tenāts vse many times to plead in such maner as thou hast said before, to saue themselues from confessing of an Ouster, & so if there be any default, it is not in the Court, ne in the Law, for they know not the truth therein till it be tryed: and mee thinketh also that there is in this case right little default or none in the tenant nor in his counsell, specially if the counsell know that the tenant is no disseisor. But as to that point I pray thee that thou as thou hast taken a respit to bee aduised, or that thou shew thy full mind in the question of a color giuen in Assise, whereof mention is made in the said 48. Chapter: that I likewise may haue a like respit in this case till another time, to bee aduised, and then I shall with good will shew thee my full mind therein.

D. I am content it be as thou saist, but I pray thee that I may yet adde another question to the 2. questions before rehearsed of the colours in assise, & serle thy mind therein, because that soundeth much to the same effect that the other doe (that is to say) to prowe that there bee diuers things suffered in the law to be pleaded & bee against the trueth: and I pray thee let me hereafter know thy mind in al thee questions, & thou shalt then with a good will know mine. S. I pray thee shew me the case that thou speakest of. D. If a man steale a horse secretly in the night, it is vsed that therupō he shalbe indicted at the kings suit, and it is vsed that in that indictment it shal be supposed that he such a day, and place with force and armes (that is to say) with staues, swords, and knines, &c. feloniously stole the horse against the kings peace, & that forme must be kept in euery indictment, though the felon had neither sword nor other weapon with him, but that hee came secretly without weapon. How can it therefore bee excused, but that therein is an vntruth? S. It is not alleadged in the indictment by matter in deed that hee had such weapon, for the forme of an indictment is this.

Inquirat̄ p dño Rege, si A. tali die & Anñ apud talē locum vi & armis, videlicèt gladijs &c. talem equum talis hominis cepit &c.

And then if the twelue men be only charged with the effect of the bill, that is to say, whether he be guiltie of the felonie or not, and not whether hee bee guiltie vnder such maner and forme as the bill specifieth or not: and so when they

they say billa vera, they say true as they take the effect of the bill to be. And therefore if there were false latin in the bill of indictment, & the Jury saith billa vera, yet their verdict is true: for their verdict stretcheth not to the trueth or falshood of the Latin, but to the felonie, ne to the forme of the words, but to the effect of the matter, & that is to inquire whether there were any such felonie done by the person or not: and though the bill vary from the day, from ỹ yere, and also from the place where the felonie was done in, so it vary not from the shire that the felony was done in, and the iury saith billa vera, they haue giuẽ a true verdict, for they are bound by their oath to giue their verdict according to the effect of the bill, & not according to ỹ forme of the bill. And so is he ỹ maketh a vow bound likewise to that that by the law is the effect of his auow, and not onely to the words of his auow. And if a man auow neuer to eat white meat, yet in time of extreame necessitie, he may eat white meat, rather than die, & nõt breake his auow, though he affirmed it with an othe: for by ỹ effect of his auow, extreme necessitie was excepted, though it were not expressly excepted in the words of the auow: & so likewise though the words of the Bill be to inquire whether such a man such a day and yeare, and in such a place did such a felonie, yet the effect of the bill is to inquire whether he did the felony within the shire or no: & therefore the Justices before whom such Indictments be taken, most commonly informe the Iurie that they are bound to regard the effect of the bill, & not the forme.

And therefore there is no vntruth in this case neither in him that made the bill, ne yet in the Iurie, as me seemeth. D. But if the partie that owed the horse bring an action of trespasse, and declareth that the defendant toke the horse w̄ force and armes, where hee toke him without force and armes: how may the plaintife there be excused of an vntruth? S. And if the plaintif surmise an vntruth, what is that to the Court or to the law, for they must beleeue the plaintife, til that ẏ he saith be denied by the defendāt. And yet as this case is, there is no vntruth in the plaintif, to say he toke the horse with force and armes, though he came neuer so secretly, & without weapon, for euerie trespas is in the law done with force and armes, so that if he be attainted and found guiltie of the trespas, he is attainted of the force and armes: And sith the law adiudgeth euerie trespasse to be done with force, therefore the plaintife saith truely that he toke him with force, as the law meaneth to be force. For though he toke the horse as a felon, yet vpon the felonious taking, the owner may take an action of trespas if he will, for euery felonie is a trespasse and more. And so I haue shewed thee some part of my mind to proue that in those cases there is no vntruth, neither in the parties, neither in the Iurie, nor in the Law. Neuertheless, at a better leasure I will shew thee my mind more fully therin with good will as thou hast promised me to doe in the cases of colours of the Assise, and of the ouster, that be before rehearsed.

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¶ The viij. queſtion of the Doctor, whether the Statute of xlv. of Edward the third of Silua cedua ſtand with conſcience.

Cap. 55.

In the 45. yere of the raigne of Ed. 3. It was enacted, that a prohibition ſhould lie where a man is impleaded in the court Chriſtian for Diſmes of wood of the age of xx. yere or aboue, by the name of Silua cedua; how may that ſtatute ſtand with conſcience that is ſo directly againſt the libertie of the Church, and that is made of ſuch things as the parliament had no authoritie to make any law of? S. It appeareth in the ſayd Statute, that it is enacted, that a Prohibition ſhould lie in that caſe, as it had vſed to do before that time, and if the prohibition lay by a preſcription before the ſtatute, why is not then the ſtatute good as a confirmation of that preſcription? D. If there were ſuch a preſcription before the Statute that preſcription was voyd, for it prohibiteth the payment of Tythes of trees of the age of xx. yere or aboue, and paying of tithes is grounded aſwell vpon the Law of God, as vpon the law of reaſon, & againſt thoſe Lawes lieth no preſciption as it is holdē moſt cōmonly by al men. S. That there was ſuch a preſcription before the ſaid ſtatute, & that if a man before ȳ ſaid ſtatut had bin ſued in the ſpirituall court for tythes of wood of the age of xx. yere or aboue, the prohibition lay, as

appeareth in the said statute: and it cannot be thought that a statute that is made by authoritie of the whole realme, aswell of the King & of the Lords spirituall & temporal as of all the commons, will recite a thing against the truth: & furthermore I cānot se how it can be grounded by the law of God, or by the law of reason that the x. part should be paid for tith and no other portion but that, but I thinke that it be grounded vpon the Law of reason that man should giue a reasonable portion of his goods temporall to them that minister to him things spirituall, for euery man is bound to honor god of his proper substance, and the giuing of such portion hath not bin only vsed among faithfull people, but also among vnfaithfull as it appeareth Gene. 47. where Corne was giuen to the priests in Egypt of cōmon barns. And S. Paul in his Epistles affirmeth the same in many places, as in his first Epistle to the Cor. Ca. 9. where he saith, He that worketh in the church, shall eat of that that belongeth to the Church: And in his Epistle to the Gal. cap. 6. he sayth, Let him that is instructed in spirituall things, depart of his goods to him y instructeth him: And S. Luke cap. 10. saith, That the workman is worthie to haue his hire. All which sayings may right conuenientlie be taken and applyed to this purpose, that spirituall men which minister to the people spirituall things, ought for their ministration to haue a competent liuing of them that they minister vnto. But that the tenth part should be assigned for such a portion and neither more nor lesse, I cannot perceiue

that

that that ſhould be grounded by the Law of reaſon, nor immediately by the Law of God: for before the law written there was no certaine portion aſſigned for the ſpirituall Miniſters, neither the x. part, nor the xij. part, vnto the time of Iacob: for it appeareth Gene. 28. that Iacob auowed to pay Diſmes which was among the Iewes for the x. part, if our Lord proſpered him in his iourney, and if the x. part had beene duetie before that auow, it had bin in vaine to haue auowed it, and ſo it had if it had bin grounded by the law of reaſon: and as to that is ſpoken in the Euangeliſts, and in the new Law of Tythes, it belongeth rather to the giuing of tythes in the time of the old law, than of the new Law, as appeareth Mathew 23. and Luke 11. where our Lord ſpeaketh to the Phariſes, ſaying, Woe to you Phariſes for tithe mints, rue, and herbes, & forget the iudgement & the charitie of God, theſe it behoueth you to doe, and the other not to omit, that is to ſay, it behoueth you to doe Iuſtice, and charity of God, & not to omit paying of tithes though it be of ſmall things as of mints, rue, herbes, and ſuch other. And alſo that the Phariſe ſayth Luke 17. I pay my tythes of all that I haue, it is to be referred to the old Law not to the time of the new Law: Therfore as I take it the paying of Tythes, or of a certaine portion to ſpirituall mē for their ſpiritual miniſtration to the people hath bin grounded in diuers maners. Firſt before the law writtē, a certaine portion ſufficient for the ſpirituall Miniſters was due to them by the Law of nature, which

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after them that bee learned in the Law of the Realme is called the law of reason, & that portion is due by all lawes. And in the law written, the Jewes were bound to giue the x. part to their priests aswell by the said auow of Iacob, as by the law of God in the old Testamẽt called the Iudicials. And in the new law the paying of the x. part, is by a law that is made by the Church. And the reason wherefore the x. part was ordayned by the church to be payd for the tithe was this; There is no cause why the people of the new law ought to pay lesse to the ministers of the new law, than the people of the old Testament gaue to the ministers of the old Testament: For the people of the new Law be bound to greater things than the people of the old Law were, as it appeareth Mat. 5. where it is sayd: Vnlesse your good workes abound aboue the workes of the Scribes & the Pharises, ye may not enter into the Kingdome of heauen. And the sacrifice of the old law was not so honorable as the sacrifice of the new Law is: for the sacrifice of the old law was only the figure, and the sacrifice of the new law is the thing that is figured, that was the shadow, this is the truth. And therfore ꝑ Church vpon that reasonable consideration ordayned, that the x. part should be paid for the sustenãce of the Ministers in the new law, as it was for the sustenance of the Ministers in the old law, & so that law with a cause may be increased or minished to more portion or to lesse as shall be necessarie for them. Do. It appeareth Gen 14. that Abraham gaue to Melchisedech tithes,

dismes, and that is taken to be the x. part, and that was long before the law written, & therfore it is to suppose, that he did that by the law of God. S. It appeareth not by any Scripture that he did that by the commandement of God, ne by any reuelation: And therfore it is rather to suppose that he did part of duty, and part of his owne free will, for in that he gaue the dismes as a reasonable portion for the sustenance of Melchisedech and his ministers, he did it by the commaundement of the Law of reason, as before appeareth, but that he gaue the x. part, that was of his free will, & because he thought it sufficient & reasonable: but if he had thought the xij. part, or the xiij. part had sufficed, he might haue giuen it, and that with good conscience. And so I suppose that in the new law, the giuing of the x. part is by a Law of the Church, and not by the Law of God, vnlesse it be taken that the law of the church is the law of God, as it is sometime taken to be, but not appropriatly nor immediatly, for that is taken appropriatly to be the law of God, that is contayned in scripture, that is to say, in the old testament and in the new. Do. It is somewhat dangerous to say that tythes be grounded only vpon the Law of the Church: for some men, as it is sayd, say that mans Law bindeth not in conscience, & so they might happe to make a boldnesse therby to deny their tithes. S. I trust there be none of that opinion, & if there be it is great pity: And neuertheless they may be compelled in that case by the law of the Church to pay their tithes aswel as they shold be if paying

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dismes, and that is taken to be the x. part, and that was long before the law written, & therfore it is to suppose, that he did that by the law of God. S. It appeareth not by any Scripture that he did that by the commandement of God, ne by any reuelation: And therfore it is rather to suppose that he did part of duty, and part of his owne free will, for in that he gaue the dismes as a reasonable portion for the sustenance of Melchisedech and his ministers, he did it by the commaundement of the Law of reason, as before appeareth, but that he gaue the x. part, that was of his free will, & because he thought it sufficient & reasonable: but if he had thought the xij. part, or the xiij. part had sufficed, he might haue giuen it, and that with good conscience. And so I suppose that in the new law, the giuing of the x. part is by a Law of the Church, and not by the Law of God, vnlesse it be taken that the law of the church is the law of God, as it is sometime taken to be, but not appropriatly nor immediatly, for that is taken appropriatly to be the law of God, that is contayned in scripture, that is to say, in the old testament and in the new. Do. It is somewhat dangerous to say that tythes be grounded only vpon the Law of the Church: for some men, as it is sayd, say that mans Law bindeth not in conscience, & so they might happē to make a boldnesse therby to deny their tithes. S. I trust there be none of that opinion, & if there be it is great pity: And neuertheless they may be compelled in that case by the law of the Church to pay their tiths alwel as they shold be if paying

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of tithes were grounded merely vpon the law of God. D. I think well it be as thou saist, and therefore I hold me contented therein. But I pray thee shew mee thy mind in this question. If a whole countrie prescribe to pay no tithes for Corne or hay, nor such other, whether thou thinke that that prescription is good. S. That question dependeth much vpō that that is said before: for if paying of the x. part be by the law of reason, or by the law of God, thē ꝑ prescription is void, but if it be by the law of man, then it is a good prescription, so that the Ministers haue a sufficient portion beside. D. John Gersō which was a Doctor of diuinitie, in a treatise that he named Regulæ morales, saith, that Dismes be paied to ꝑiests by the law of God. S. The words that he speaketh there of the matter be these, Solucio decimarū sacerdotibus, est de iure diuino, quatenꝰ inde sustētētur: sed quoad tā hanc vel illā assignare, aut in alios redditus cōmutare, positiui iuris existit, that is thus much to say, The paying of dismes to priests, is of ꝑ law of God, ꝑ they may therby be sustained, but to assigne this portion or ꝑ, or to chāge it to other rents, that is by the law positiue: s if it should be taken that by that word Decimarū, which in English is called dismes or tythes, that he meant the x. part, and that that x. part should be paid for tithe by the law of God, then is the sentence that followeth after against that saying: for as it appeareth aboue, the text saith afterward thus, but to assigne this portion or that, or to change it into other rents belongeth to the law positiue, that is, to the law

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of man, and if the x. part were assigned by god, then may not a lesse part be assigned by the law of man, for that should be contrarie to the Law of God, and so it should ber void. And mee thinketh that it is not likely that so famous a clerk would speake any sentence contrarie to the law of God, or contrarie to that he had spoken before: & to proue he meant not by the terme Decimæ, that dismes should alway be take for the x. part, it appeareth in the 4. part of his workes in the 32. title Literę, where he saieth thus, Nō vocatur portio curatis debita ꝓpterea decimæ, eo quod semper sit decima pars, immo est interdum vicesima aut tricesima: That is to say, the portiō due to curats, is not therefore called dismes, for ꝑ it is alway ꝑ x part, for somtime it is the xx. or the xxx part: and so it appeareth that by this word decimarū, hee meant in ꝑ text before rehearsed a certain portion, & not precisely the x. part, and that the portion should bee paid to Priests by the law of God, to sustaine them with, taking as it seemeth the law of reason in that saying for the law of God, as it may one way be well and conuenientlie taken: because the law of reason is giuen to euerie reasonable creature by God. And then it followeth pursuantly, that it belongeth to the law of man to assigne this portion or that, as necessitie shall require for their sustenance, and then his saying agreeth well to that that is said before, that is to say, that a certaine portion is due for priests, for their spirituall ministration by the law of reason. And then it would follow thereupon, that if it were ordained for a law, that all pay-

paying of tythes should from henceforth cease, & that euerie curat should haue assigned to him such certain portiō of land, rent, or annuity, as should be sufficient for him, & for such ministers as should be necessarie to bee vnder him, according to the number of the people there, or that euery Parishoner or householder should giue a certaine of money to ỳ vse, I suppose the law were good: & that was the meaning of Io. Gerson, as it seemeth in his words before rehersed, where he saith, but to chaunge tythes into other rents, is by the law positiue, that is to say, by the Law of man. And some thinke that if a whole Countrie prescribe to bee quite of both tythes of corne or grasse, so that the Spirituall Ministers haue a sufficient portion beside to liue vpon, that is a good prescription, & ỳ they should not offend, that in such countries payed no tithes: for it were hard to say, that all the men of Italy, or of the East parts bee damned, because they pay no tythes, but a certaine portion after the custome: therefore certaine it is, to pay such a certaine portion, as wel they as all other be bound, if the church aske it, any custome notwithstanding. But if the Church aske it not, it seemeth that by that not asking, the church remitteth it, & an example therof we may take of the Apostle Paul, that though hee might haue taken his necessarie liuing of them that he preached to, yet he toke it not, & neuertheless they that gaue it him not, did not offēd because he did not aske it. But if one man in a town would prescribe to be discharged of tithes of corne & grasse, mee thinketh the prescription

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is not good, vnles he can proue ẏ he recompenceth it in another thing: for it seemeth not reasonable that hee should pay lesse for his tythes than his neighbors do, seeing that the spirituall ministers are bound to take asmuch diligẽce for him, as they be for any other of ẏ parish: wherfore it might stand with reason ẏ hee should bee cõpelled to pay his tithe as his neighbors do, vnles he can proue that he paieth in recõpence thereof, more than the x. part in another thing. Neuerthelesse I leaue the mater to ẏ iudgemẽt of other, & then for a further proofe, though the said prescription of not paying tithes for trees of 20. yere & aboue, were not good, yet that that of corn & grasse should be good, some make this reasõ: they say, ẏ there is no tith but it is either a predial tithe, or a personal tith, or a mixt tith, & they say ẏ if a tith should be paid of trees whẽ they be sold, that the tithe were not a prediall tith, for the prediall tith of trees is of such trees as bring forth fruits & increase yerely, as apple trees, nut trees, peare trees, & such other, whereof the predial tith is the apples, nuts, peares, & such other fruits as come of thẽ yerely, & when the fruits bee tithed, if the owner after fell the trees, there is no tith due therby, for two tithes may not be paid of one thing, & of those tithes, ẏ is to say, of predial tithes was the cõmandemẽt giuen in the old law to the Iewes, as appeareth Leuit. 27. where it is said, Omnes decimæ terræ, siue de pomis arborum, siue de frugibus, domini sunt, & illi sanctificãtur, that is to say, all tithes of the earth, either of apples of trees, or of grains, be our lords, & to him they be sãctified,

and

and though the said law speaketh onely of apples, yet it is vnderstood of all maner of fruits. And because it saieth that all the tythes of the earth be our Lords, therefore calues, lambes, and such other must also be tythed, and they be called by some men prædiall tythes, that is to say, tythes that come of the ground, howbeit they call them onely Predials mediate, & they be the same tythes that in this writing, bee called mixt tithes, and the other tythes (that is to say) tythes of apples & corne, & such other be called Predials immediate, for they come immediatly of the ground, and so do not mixt tithes, as euidently appeareth. D. But what thinkest thou shall bee the prædiall tythes of ashes, elmes, sallowes, alders, and such other trees as beare no fruits, whereof any profit commeth, why shall not the 10. part of the selfe thing bee the tythe therefore, if they be cut downe as wel as it is of corne and grasse? S. For I think that there is to that intent great diuersitie betweene corne, grasse, and trees, and that for diuers considerations, whereof one is this: The propertie of corn & grasse is not to grow ouer one yere, and if it doe, it will perish and come to nought, and so the cutting downe of it, is the perfection and preseruation thereof, and the speciall cause that any increase followeth of the same: And therefore the tenth part of the increase shall bee paid as a prædiall tythe, and there no deduction shall bee made for the charges of it: And so it is of sheepe and beasts that must bee taken and killed in time, for els they may perish and come to nought: but when trees bee felled, that felling

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is not the perfection of the trees, ne it causeth not them increase, but to decay: For most commonly the trees would bee better if they might grow still. And therefore vpon that that is the cause of that decay & destruction of them, it seemeth there can no predial tith arise: & some mē say that this was the cause why our Lord in the said Chapter of Leuit. 27. gaue no commaundement to tithe the trees, but the fruits of the trees onely. Do. It appeareth in Paralip. 31. that the Iewes in the time of the King Ezechias offered in the Temple all things that the ground brought forth, and that was trees as well as corne & grasse. Sr. It appeareth not that they did that by the commaundement of God, and therefore it is like that they did it of their owne deuotion, and of a fauour that they had aboue their duetie to the repairing of the Temple, which the king Ezechias had thē cōmaunded to be repaired: And so that text prouueth nothing that tithe should bee payed for trees: And therfore they say farther, that truth it is, that if a man to the intent hee would pay no tythe, would wilfully suffer his corne and grasse to stand still and to perish, hee should offend conscience thereby: but though hee suffer his trees to stand still continually without felling, because hee thinketh a tithe would bee asked, if he felled them (so that he doe it not of an euill will of the Curate) hee offendeth not in conscience, ne hee is not bound to restitution therefore, as he should be if it were of corne and grasse, as before appeareth. And another diuersity is this: In this case of tythe wood, that

tythe thereof would serue so little to that purpose that tythes be paied for, that it is not likely that they that made the Law for payment of tithes entended that any tithe should bee paied for trées or wood: For the spirituall ministers must of necessitie spend daily and weekely, and therefore the tithes of trées or wood that commeth so seldome, would serue so little to the purpose that it should be paid for, that it would not helpe them in their necessitie: So that if they should bee driuen to trust thereto, though it might help him in whose time it should happen to fall, yet it should deceiue them that trusted to it in the meane time, and also should leaue the Parish without any to Minister to them. D. I would well agrée that for trées that beare fruit there should no prediall tith be paid when they be sold (for the prediall tithe of them is the fruits that come of them) and so there cannot bee two predials of one thing, as thou hast said. But of other trées that beare no fruit, mee thinketh that a prediall tythe should be paid when they be sold, and so it appeareth that there ought to bee by the constitution prouinciall made by the reuerend Father in God Robert Winchelsie late archbishop of Canterburie, where it is said and declared, that Silua cedua is of euerie kind of trées that haue being in that they should bee cut, or that bee able to bee cut, whereof we will, saith he, that the possessour of the said woods bee compelled by the censures of the Church to pay to the Parish Church, or mother Church, the tithe as a reall or predial tithe: And so by verture of that constitution

ſtitution prouinciall a predial tith muſt be paid of ſuch trees as haue no fruite: For I would well agree that the ſaid conſtitution prouinciall ſtretcheth not to trees ꝑ beare fruit as though ꝑ woods bee generall for all trees (as before appeareth.) Stu. I take not the reaſon why a predial tith ſhould not be paid for trees that beare fruit to bee, becauſe two predial tithes cannot be paid for one thing: for when the tith is paid of lambes, yet ſhall tithe be paid of wooll of the ſame ſheep (for it is paid for another increaſe) and ſo it may bee ſaid that the fruit of a tree is one increaſe, and the felling another: But I take the cauſe to bee for the two cauſes before rehearſed, & alſo foraſmuch as the felling is not properly an increaſe of the trees but a deſtructiō of the trees, as it is ſaid before. And farther I would heare thy mind vpon the ſaid conſtitution prouinciall, which will, that tythe ſhould be paid for trees by the poſſeſſors of the wood, that if the poſſeſſour ſell the wood for C. l. and giue the buier a certaine time to fell it in, what tith ſhall the poſſeſſor pay as long as the wood ſtandeth? Do. I thinke none, for the predial tithe commeth not till the wood bee felled, and a perſonall tithe hee cannot pay, no more than if a man pluck downe his houſe and ſelleth it, or if he ſel all his land, in which caſes I agree well hee ſhall pay no tithe neither perſonall nor predial. St. And then I put caſe that the buyer ſelleth the wood againe as it is ſtanding vpon the ground to another for CC. l. what tithe ſhall be paid then? Doct. Then the firſt buyer ſhall pay tithe of the ſurpluſage that

he taketh ouer the C.l. that he paied as a Parsonall Tithe. Scu. And then if the second buyer after that cut it downe and sell it when it is cut down for lesse then he paid, what tith shall then be paid?

D. Then shall he that selleth them pay ỹ tith for the trees as a prediall tithe. St. I cannot see how that can be, for he neither hath the trees, that the prediall tithe should be paid for, if any ought to be paid, nor he is not possessour of the ground where the trees grow: And therefore if any prediall tithe should be paid, it should bee paied either by the first possessour by reason of the words of the said constitution prouinciall, which be, that the tithe shal bee paid by the possessour of the wood, or by the last buyer, because hee hath the trees that should bee tithed, and by the first possessour the tithe cannot bee paied as a prediall, for hee cut them not downe, ne they were not cut downe vpon his bargain, and by the last buyer it cãnot be paid neither as a prediall tithe; for the said constitution saith, that the possessor of the woods should bee compelled to pay it. And therefore I suppose that the troth is, that in that case no tith shall bee paied, for as to the last seller, hee shall pay no parsonall tithe, for hee gained nothing, as it appeareth before, and no prediall tithe shall be paied, for it should bee against the said prescription, and also the cutting downe is the destruction of trees and not their preseruation, as is said before.

D. Then takest thou the said constitution to be of small effect, as it seemeth. S. I take it to be

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of this effect, that of wood aboue twentie yeare it bindeth not, because it is contrary to the cõmon law, and to the said prescription, that stãdeth good in the common law: but of wood vnder xx. yere whereof tith hath bẽn accustomed to be payed, the constitution is not against the said prescription, because paying of tithe vnder xx. yeare is not prohibited, but suffered by the said statute: howbeit some say, that by the very rigour of the common Law tythes should not be payed for wood vnder xx. yere, no more than for aboue xx. yere, and that Prohibition in that case lyeth by the common law: Neuertheless, because it hath bin suffered to the contrary, & that in many places tythe hath bin paid thereof, I passe it ouer, but where tythe hath not bin payed of wood vnder xx. yeare, I thinke none ought to be payd at this day in law nor conscience: But admit, that the said constitution taketh effect for payment of the wood vnder xx. yeares as of a prediall tythe, yet I cannot see how the tythe thereof should be payed by the possessour of the wood, if he sell them, but that it should be paid rather by him that hath the trees, for the constitution is, that the tythe shall be paid as a reall or a predial tythe, and that is the tenth part of the same trees, as it is of corn. And if a man buy corne vpon the ground, the buyer shall pay the tythe and not the seller, and so it should seeme to be here, and what the constitution meant to decree the contrary in tythe wood, I cannot tell, vnlesse the meaning were to induce the owners to pay Tythes of great trees when they fell them to their owne vse:

which mē thinketh should bee verie hard to stand with reason, though the sayd statute had neuer bēn made, as I haue sayd before. And furthermore I would here (vnder correction) moue one thing, & that is this; That as it seēmeth that they that were at the making of the sayd Constitution & knew the sayd prescriptiō, did not follow the direct order of charitie therin so perfectly as they might haue done: For when they made the sayd constitution prouinciall directly against the sayd prescription, they set Law against custome, and power against power, and in maner the Spiritualtie against the tēporaltie, whereby they might well know that great variance & suit should follow; And therefore if they had clērely seēne that the sayd prescription had beene against conscience they should first haue moued the king and his counsell & the nobles of the realme to haue assented to the reformation of that prescription, and not to make a law as it were by authoritie & power against the Prescription, and then to threat the people & make them beleeue that they were all accursed that kept the said Prescription or ꝑ maintained it. And it seēmeth to stand hardly with conscience to report so many to stand accursed for following of the sayd statute and of the said prescription as there doe, and yet to do no more than hath bin done to bring them out of it. Do. We thinketh that it is not conuenient that lay mē should argue the lawes and the decrees or constitutions of the Church, and therefore it were better for them to giue crēdēce to spiritual rulers that haue cure of their soules

soules than to trust to their owne opinions, and if they would doe so, then such matters would much the more rather cesse, thā they will go by such reasonings. S. In that that belongeth to the articles of the faith, I thinke the people be bound to beleeue the Church, for the Church gathered together in the holy ghost cānot erre in such things as belong to the Catholique faith: But where the church maketh any lawes whereby the goods or possessions of the people may be bound, or by this occasion or that may be taken from them, there the people may lawfully reason whether the Lawes bind them or not, for in such lawes the Church may erre and be deceiued, and deceiue other, either for singularity, or for couetice, or some other cause: and for that consideration it pertayneth most to them that be learned in the Law of the realme to know such lawes of the Church, as treat of the ordering of lands or goods: to see whether they may stand with the lawes of the realme or not: And therefore it is necessary for them to know the Lawes of the Church that treat of Dismes, of Executors, of testaments, of Legacies, bastardie, matrimonie, and diuers other, wherein they be bound to know when the Law of the Church must be followed, and when the law of the realme; wherof because it is not our purpose to treat, I leaue to speake any more at this time, and will resort againe to speake of Tythes, wherein some men say that of Tinne, Cole, and Lead, no tithe should be payed when they be sold by the owner of the ground, because it is part of the inheritance,

and it is more rather a destruction of the inheritance, than an encrease: And therefore they say, that if a man take a Tenne worke, & giue the Lord the tenth dish according to the custome, that the Lord shall pay no tythe of that tenth dish, neither predial nor personall, but if the other that taketh the worke haue gaines & aduantage by the work, it seemeth that it were not against reason that he should pay a personall Tithe of his gaines, the charge deducted. Do. I pray thee shew me first what thou takest for a personall tythe, and vpon what ground personal tiths be paid as thou thinkest, so that one of vs mistake not another therein. S. I will with good will; and therefore thou shalt vnderstand that, as I take it, personall tythes be not paid for any increase of the ground, but for such profit as commeth by the labour or industry of the person, as by buying and selling, and such other, and such personall tythes, as I take it, must bee ordered after the custome, and the Church hath not vsed to leuie those Tythes of compulsion, but by conscience of the parties: Neuertheles Raimond sayth, that it is good to pay personall tythes, or with the assent of the parson, to distribute them to poore mē, or els to pay a certain portiō for the whole. But as Innocent sayth, where the custome is, that they should bee payed, the people be bound to pay them aswell as predials, the expences deduct. Howbeit in the Church of England they vse to sue for such personall tithes as well as for predials, & that is by reason of the constitution prouinciall, that was made by Robert Winchelsie,

chelſie, By the which it was ordayned, that perſonall Tythes ſhould be paid of crafts and Merchandize, and of the lucre of buying and ſelling, & in likewiſe of Carpenters, Smiths, Weauers, Maſons, and all other that worke for hire, that they ſhall pay tythes of their hire except they will giue any thing certaine to the vſe, or to the light of the Church, if it ſo pleaſe the Parſon: And in another place the ſayd Archbiſhop ſayeth, that of the paſturage of Woods, and ſuch other things &c. and of fiſhings, trees, bees, douues, and of diuers other thungs there remembred, and of crafts, and of buying and ſelling, & of the profits of diuers other things there recited, euerie man ſhould helpe ſatisfie competently in the Church, to the which they be bound to giue it of right, no expences by the giuing of the ſayd Tythes deducted or withholden, but onely for the payment of tythes of crafts and of buying and ſelling: And by reaſon of the ſayd conſtitutions prouinciall, ſometimes ſuits bee taken in the Spirituall Court for perſonall tithes, and thereof many men do maruaile, becauſe deductions many times muſt be referred to the conſcience of the parties. And they maruaile alſo why a Law ſhould be made in this realme for paying of Perſonall tythes, more than there is in other Countries. And here I would gladly moue thee farther in one thing concerning ſuch perſonall tythes, to know thy mind therein, and that is, If a man giue to another a horſe, and he ſelleth that horſe for a certaine ſumme, ſhall he pay any tythe of that ſumme?

D. What

Do. What thinkeſt thou therein? St. I thinke that he ſhall pay no tythe: For there as I take it the profit commeth not to him by his owne induſtrie, but by the gift of another, and as I take it, perſonall tythes be not paied for euerie profit or aduauntage that commeth newly to a man, except it come by his owne induſtrie or labour, and ſo it doth not here. And alſo if he ſhould pay tythe of that he ſold the horſe for, he ſhould pay tythe for the verie whole value of the thing. And as I take it, the perſonall tithes for buying and ſelling ſhall neuer be payed for the value of the thing, but for the clære gaines of the thing: And therefore I take the caſes before rehearſed, where a man ſelleth his land, or pulleth downe a houſe, and ſelleth the ſtuffe, that he ſhould there pay no tith, that it is there to be vnderſtood, that he hath not land or houſe by gift or by diſcent: For if a man buy land, or buy timber and ſtuffe of a houſe, and ſell it for a gayne, I ſuppoſe that he ſhould pay a perſonall tythe for that gaine. And this caſe is not like to a fee or annuitie granted for counſell, where the whole fee ſhal be tithed for the charges deducted, or ſome certaine ſumme for it by agrëment, for there the whole fee commeth for his counſell, which is by his owne induſtrie. But in the other caſe it is not ſo, and the ſame reaſon as for the perſonal tithe might be made of trees, when they diſcend or be giuen to any man, and he ſelleth them to another, that he ſhall pay no perſonall tythe. Do. Me thinketh that if the horſe amend in his kæping, & then he ſell the horſe, that then the tithe ſhalbe paied

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of that that the horse hath increased in value after the gift, and so it may be of trées, that he shall pay tythe of that that the trées may be amended after the gift or discent. Stu. Then the tythe must be the x. part of the increase the expences deducted, and then of trées the charges must also bee deducted, for it is then a Parsonall tithe, and there is no trée that is so much worth as it hath hart the ground by ꝑ growing: therefore there can no Parsonall tythe be paid by the owner of the ground when he selleth them, though they haue increased in his time. Neuertheless I will speake no farther of that matter at this time, but will shew thee, that if Tin, Lead, Cole, or trées be sold, that a mixt tithe cannot grow thereby; For a mixt tithe is properly of Calues, Lambs, Pigs, and such other that come part of the ground that they bee fed of, and part of the keeping, industrie, and ouerlight of the owners, as it is said before: But Tin, Lead, and Cole are part of the ground and of the freehold, & trees grow of themselues, and be also annexed to the freehold, and will grow of themselues: and also the mixt tithe must bee paid yearely at certaine times appointed by the Law or by custome of the countrie, but it may happen that Tinne, lead, cole, & trees, shall not bee felled or taken in many yeres, & so it seemeth it cānot be any mixt tithe, & these be some of the reasons, which they ꝑ would maintaine ꝑ statut & prescription to be good, make to proue their intent as they think. D. what think they, if a man sel the lops of his wood, whether any tith ought there to be paid?

S. They

S. They thinke all one law of the trees and of the lops. D. And if he vse to fell the lops once in xij. or xvj. yere, what hold they then? S. That is all one. D. And what is the reason why Tythe ought not be payed there aswell as for wood vnder xx. yeare? S. For they say, that the lops are to be taken of the same condition as the Trees be what time soeuer they be felled, and that no custome will serue in that case against the statute, no more than it should do of great trees. D. And what hold they of the barke of the trees? Stu. Therein I haue not heard of their opinion, but it seemeth to be one Law of the lops. Doct. I perceiue well by that thou hast sayd before, that thy mind is, that if a whole Countrie prescribe to be quite of Tythes of trees, corne, and grasse, or of any other tythes, that that prescription is good, so that the spirituall ministers haue sufficient beside to liue vpon, doest thou meane so? S. Yes verily. D. And then I would know thy mind, if any man contrary to that prescription were sued in the Spirituall Court for Corne and grasse, or any other Tythes, whether a Prohibition should lye in that case, as it did after thy mind before the sayd Statute, where a man was sued in the Spirituall Court for Tythe Wood.

S. I thinke nay. D. And why not there, aswell as it did where a man was sued for the tythe wood? S. For as I take it, there is great diuersitie betweene the cases, and that for this cause; There is a Maxime in the law of England, that if any suit be taken in the Spirituall

Court

court, whereby any goods or lands might bee recouered, which after the grounds of the law of the Realme ought not to bee sued there, though percase the Kings Court shall hold no plee thereof, that yet a Prohibition should lye, and after when it had continued long that no tythes were paied of wood, because of the said prohibition, and that after by processe of time some Curats began to aske Tithes of wood, contrarie to the Law and contrarie to the said prescription, so that variance began to rise betweene Curats and their Parishoners in that behalfe, then for appeasing the said variance the said statute was made, and that as it seemeth more at the calling on of the spiritualtie than of the Temporalty; For the Statut doth not expresselp graunt that the Prohibition in that case of tythe wood should lye so largely as some say it lay by the Law: Howbeit, it doth not restraine the common Law therein, as it appeareth euidently by the words of the Statute, and so after some men it appeareth before the Statut, and also after the Statute (as I haue touched before) that the spirituall Court ought not in that case to haue made any processe for tithe wood: and therefore if they did, a Prohibition lay by the cõmon Law. And like law is if the spiritual court make proces vpon such a Legacie as by the law of the realme is void. As if a man bequeth to one another mãs horse, & the spirituall court thereupon maketh Processe to execute that legacy, there a Prohibition lyeth: For it appeareth euidently in the libell, if all the trueth appeare in the libel, that

in

in the law of the realme the legacie is void to all intents: And that hee to whom the legacie is made, shall neither haue the horse nor the value of the horse. And in likewise if a man sell his land for T.R. and he is sued after in the spirituall court for tithe of the said T.R. There a Prohibitiō shall lie, for it appeareth in that case openly in ỹ libell that no tith ought to bee paid, and that the spirituall Law ought not in that case to make any processe whereby the goods of him that sold the land might be taken from him against the law of the Realme. And vpon this ground it is, that if a man were sued in the Spirituall Court, now sith the statute for a Mortuarie, that a Prohibition should lye, for it appeareth in the libell, that sith the statut there ought no suit to be taken for Mortuaries: and the same law is, if any suit were taken in the Spirituall court for a new dutie that is of late taken in some places vpon leases of Parsonages and vicarages, which is called Dimission noble, for it appeareth euidently in the libell if any be made thereupon, that no such Processe ought by the law of the Realme to bee made in that behalfe. But in the case of tythe corne or grasse, or such other things, wherein thou hast desired to know my mind, there appeareth nothing in the libell but that the suite thereof, of right appertaineth to the spirituall Law, and so for any thing that appeareth, the partie may bee holpen in the Spirituall Court by the prescription: And if the case were so farre put that in the Spirituall Court they would not allow the said prescription, yet I thinke no

pro-

prohibition should lye: For though the spirituall Judges in a spirituall matter denie ẏ parties of iustice, yet the Kings lawes cannot reforme that, but must remit to their conscience: But if there were some remedie prouided in that case, it were well done: For some men say, that in the spirituall Court they will admit no plée against tithes. And also if a cōposition were made by assent of the Patron and also of the Ordinarie between a Parson & one of his parishioners, that the Parson & his successors should haue for a certaine groūd so many quarters of corne for his tithe yerely, & after contrarie to the composition the Parson in the spirituall Court asketh the tithes as they fall, that in this case no Prohibition should lye, ne yet though the case were further put, that the cōposition were pleaded in the Court & were disallowed, but all resteth in the conscience of the Judge spirituall (as is said before.) Howbeit, because some bee of opinion that a Prohibition should lye in this last case, therefore I will refer it to the iudgement of other: But in the case of prescription, before rehearsed, I take it for the cleerer case, that no Prohibitiō should lie as I haue said before. And I beseech our Lord that this matter & such other like thereto, may be so charitably looked vpon, that there bee not hereafter such diuisions ne such diuersities of opiniōs therin, as hath bin in time past, whereby hath followed great costs and charges to many persons in this Realme: And that hath moued me to speake so farre in this Chapter, and in diuers other Chahters in this present

booke

booke as I haue done: Not intending thereby to giue occasion to any person to withhold his tithes that of right ought to bee paid, ne to alter the portion therein before accustomed, but that (as me thinketh) they ought to be claimed by the said title as they ought to bee payed, and by none other. And that it may also somewhat appeare that the said statute of 45. Ed. 3. was well and lawfully made, and vpon a good reasonable consideratiõ, and that the said prescription is good also, so that no man was in any danger of excommunication for the making of the said statute, nor yet is not for the obseruing thereof, ne yet of the said prescription, as it is noted by some persons that there should bee. And thus I commit thée vnto our Lord, who euer haue both thee and mée in his blessed keeping euerlastingly. Amen.

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8.

THE DIALOGVE in Englisſh, betweene *a Doctor of Diuinitie*, and a Student in the Lawes of England.

Tho. Hayward

Newly corrected and Imprinted, with new *Additions.*

LONDON
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1613.

Cum Priuilegio.

tythe thereof would serue so little to that purpose that tythes be paied for, that it is not likely that they that made the Law for payment of tithes entended that any tithe should bee paied for trées or wood: For the spirituall ministers must of necessitie spend daily and weekely, and therefore the tithes of trées or wood that commeth so seldome, would serue so little to the purpose that it should be paid for, that it would not helpe them in their necessitie: So that if they should bee driuen to trust thereto, though it might help him in whose time it should happen to fall, yet it should deceiue them that trusted to it in the meane time, and also should leaue the Parish without any to Minister to them. D. I would well agrée that for trées that beare fruit there should no prediall tith be paid when they be sold (for the prediall tithe of them is the fruits that come of them) and so there cannot bee two predials of one thing, as thou hast said. But of other trées that beare no fruit, mee thinketh that a prediall tythe should be paid when they be sold, and so it appeareth that there ought to bee by the constitution prouinciall made by the reuerend Father in God Robert Winchelsie late archbishop of Canterburie, where it is said and declared, that Silua cedua is of euerie kind of trees that haue being in that they should bee cut, or that bee able to bee cut, whereof we will, saith he, that the possessour of the said woods bee compelled by the censures of the Church to pay to the Parish Church, or mother Church, the tithe as a reall or predial tithe: And so by verture of that constitution

ſtitution prouinciall a predial tith muſt be paid of ſuch trees as haue no fruite: For I would well agree that the ſaid conſtitution prouinciall ſtretcheth not to trees ꝑ beare fruit as though ꝑ woods bee generall for all trees (as before appeareth.) Stu. I take not the reaſon why a predial tith ſhould not be paid for trees that beare fruit to bee, becauſe two predialL tithes cannot be paid for one thing: for when the tith is paid of lambes, yet ſhall tithe be paid of woll of the ſame ſheep (for it is paid for another increaſe) and ſo it may bee ſaid that the fruit of a tree is one increaſe, and the felling another: But I take the cauſe to bee for the two cauſes before rehearſed, & alſo foraſmuch as the felling is not properly an increaſe of the trees but a deſtructiō of the trees, as it is ſaid before. And farther I would heare thy mind vpon the ſaid conſtitution prouinciall, which will, that tythe ſhould be paid for trees by the poſſeſſors of the wood, that if the poſſeſſour ſell the wood for C. l. and giue the buier a certaine time to fell it in, what tith ſhall the poſſeſſor pay as long as the wood ſtandeth? Do. I thinke none, for the predial tithe commeth not till the wood bee felled, and a perſonall tithe hee cannot pay, no more than if a man pluck downe his houſe and ſelleth it, or if he ſel all his land, in which caſes I agree well hee ſhall pay no tithe neither perſonall nor predial. St. And then I put caſe that the buyer ſelleth the wood againe as it is ſtanding vpon the ground to another for CC. l. what tithe ſhall be paid then? Doct. Then the firſt buyer ſhall pay tithe of the ſurpluſage that

he taketh ouer the C.x. that he paied as a Parsonall Tithe. Stu. And then if the second buyer after that cut it downe and sell it when it is cut down for lesse then he paid, what tith shall then be paid?

D. Then shall he that selleth them pay ẏ tith for the trees as a prediall tithe. St. I cannot see how that can be, for he neither hath the trees, that the prediall tithe should be paid for, if any ought to be paid, nor he is not possessour of the ground where the trees grow: And therefore if any prediall tithe should be paid, it should bee paied either by the first possessour by reason of the words of the said constitution prouinciall, which be, that the tithe shal bee paid by the possessour of the wood, or by the last buyer, because hee hath the trees that should bee tithed, and by the first possessour the tithe cannot bee paied as a prediall, for hee cut them not downe, ne they were not cut downe vpon his bargain, and by the last buyer it cãnot be paid neither as a prediall tithe; for the said constitution saith, that the possessor of the woods should bee compelled to pay it. And therefore I suppose that the troth is, that in that case no tith shall bee paied, for as to the last seller, hee shall pay no parsonall tithe, for hee gained nothing, as it appeareth before, and no prediall tithe shall be paied, for it should bee against the said prescription, and also the cutting downe is the destruction of trees and not their preseruation, as is said before.

D. Then takest thou the said constitution to be of small effect, as it seemeth. S. I take it to be

of

of this effect, that of wood above twentie yeares it bindeth not, because it is contrary to the cõmon law, and to the said prescription, that stãdeth good in the common law: but of wood vnder xx. yere whereof tith hath bin accustomed to be payed, the constitution is not against the said prescription, because paying of tithe vnder xx. yeare is not prohibited, but suffered by the said statute: howbeit some say, that by the very rigour of the common Law tythes should not be payed for wood vnder xx. yere, no more than for aboue xx. yere, and that Prohibition in that case lyeth by the common law: Neuertheless, because it hath bin suffered to the contrary, & that in many places tythe hath bin paid thereof, I passe it ouer, but where tythe hath not bin payed of wood vnder xx. yeare, I thinke none ought to be payd at this day in law nor conscience: But admit, that the said constitution taketh effect for payment of the wood vnder xx. yeares as of a prediall tythe, yet I cannot see how the tythe therof should be payed by the possessour of the wood, if he sell them, but that it should be paid rather by him that hath the trees, for the constitution is, that the tythe shall be paid as a reall or a prediall tythe, and that is the tenth part of the same trees, as it is of corn. And if a man buy corne vpon the ground, the buyer shall pay the tythe and not the seller, and so it should seeme to be here, and what the constitution meant to decree the contrary in tythe wood, I cannot tell, vnlesse the meaning were to induce the owners to pay Tythes of great trees when they sell them to their owne vse:

which me thinketh should bee verie hard to stand with reason, though the sayd statute had neuer been made, as I haue sayd before. And furthermore I would here (vnder correction) moue one thing, that is this; That as it seemeth that they that were at the making of the sayd Constitution knew the sayd prescriptiõ, did not follow the direct order of charitie therin so perfectly as they might haue done: For when they made the sayd constitution prouinciall directly against the sayd prescription, they set Law against custome, and power against power, and in maner the Spiritualtie against the tẽporaltie, wherby they might well know that great variance & suit should follow; And therefore if they had clerely seene that the sayd prescription had beene against conscience they should first haue moued the king and his councell & the nobles of the realme to haue assented to the reformation of that prescription, and not to make a law as it were by authoritie & power against the Prescription, and then to threat the people & make them beleeue that they were all accursed that kept the said Prescription or maintained it. And it seemeth to stand hardly with conscience to report so many to stand accursed for following of the sayd statute and of the said prescription as there doe, and yet to do no more than hath bin done to bring them out of it. Do. Me thinketh that it is not conuenient that lay mẽ should argue the lawes and the decrees or constitutions of the Church, and therefore it were better for them to giue credẽce to spiritual rulers that haue cure of their soules

soules than to trust to their owne opinions, and if they would doe so, then such matters would much the more rather cesse, thā they wil go by such reasonings. S. In that that belongeth to the articles of the faith, I thinke the people be bound to beleeue the Church, for the Church gathered together in the holy ghost cānot erre in such things as belong to the Catholique faith: But where the church maketh any lawes wherby the goods or possessions of the people may be bound, or by this occasion or that may be taken from them, there the people may lawfully reason whether the Lawes bind them or not, for in such lawes the Church may erre and be deceiued, and deceiue other, either for singularity, or for couetice, or some other cause: and for that consideration it pertayneth most to them that be learned in the Law of the realme to know such lawes of the Church, as treat of the ordering of lands or goods & to see whether they may stand with the lawes of the realme or not: And therefore it is necessary for them to know the Lawes of the Church that treat of Dismes, of Executors, of testaments, of Legacies, bastardie, matrimonie, and diuers other, wherein they be bound to know when the Law of the Church must be followed, and when the law of the realme; wherof because it is not our purpose to treat, I leaue to speake any more at this time, and will retort againe to speake of Tythes, wherein some men say that of Tinne, Cole, and Lead, no tithe should be payed when they be sold by the owner of the ground, because it is part of the inheritance,

and it is more rather a destruction of the inheritance, than an encrease: And therefore they say, that if a man take a Tenne worke, & giue the Lord the tenth dish according to the custome, that the Lord shall pay no tythe of that tenth dish, neither prediall nor personall, but if the other that taketh the worke haue gaines & aduantage by the worke, it seemeth that it were not against reason that he should pay a personall Tithe of his gaines, the charge deducted. Do. I pray thee shew me first what thou takest for a personall tythe, and vpon what ground personall tithe be paid as thou thinkest, so that one of vs mistake not another therein. S. I will with good will: and therefore thou shalt vnderstand that, as I take it, personall tythes be not paid for any increase of the ground, but for such profit as commeth by the labour or industry of the person, as by buying and selling, and such other, and such personall tythes, as I take it, must bee ordered after the custome, and the Church hath not vsed to leuie those Tythes of compulsion, but by conscience of the parties: Neuertheles Raimond sayth, that it is good to pay personall tythes, or with the assent of the parson, to distribute them to poore mē, or els to pay a certain portiō for the whole. But as Innocent sayth, where the custome is, that they should bee payed, the people be bound to pay them aswell as predials, the expences deduct. Howbeit in the Church of England they vse to sue for such personall tithes as well as for predials, a that is by reason of the constitution prouinciall, that was made by Robert Winchelsie,

chelſie, By the which it was ordayned, that perſonall Tythes ſhould be paid of crafts and Merchandize, and of the lucre of buying and ſelling, & in likewiſe of Carpenters, Smiths, Weauers, Maſons, and all other that worke for hire, that they ſhall pay tythes of their hire except they will giue any thing certaine to the vſe, or to the light of the Church, if it ſo pleaſe the Parſon: And in another place the ſayd Archbiſhop ſayeth, that of the pawnage of Woods, and ſuch other things &c. and of fiſhings, trées, bées, doues, and of diuers other things there remembred, and of crafts, and of buying and ſelling, & of the profits of diuers other things there recited, euerie man ſhould helpe ſatiſfie competently in the Church, to the which they be bound to giue it of right, no expences by the giuing of the ſayd Tythes deducted or withholden, but onely for the payment of tythes of crafts and of buying and ſelling: And by reaſon of the ſayd conſtitutions prouincials, ſometimes ſuits bee taken in the Spirituall Court for perſonall tithes, and thereof many men do marualle, becauſe deductions many times muſt be referred to the conſcience of the parties. And they marualle alſo why a Law ſhould be made in this realme for paying of Perſonall tythes, more than there is in other Countries. And here I would gladly mone thée farther in one thing concerning ſuch perſonall tythes, to know thy mind therein, and that is, If a man giue to another a horſe, and he ſelleth that horſe for a certaine ſumme, ſhall he pay any tythe of that ſumme?

Do. What thinkeſt thou therein? St. I thinke that he ſhall pay no tythe: For there as I take it the profit commeth not to him by his owne induſtrie, but by the gift of another, and as I take it, perſonall tythes be not paied for euerie profit or aduauntage that commeth newly to a man, except it come by his owne induſtrie or labour, and ſo it doth not here. And alſo if he ſhould pay tythe of that he ſold the horſe for, he ſhould pay tythe for the verie whole value of the thing. And as I take it, the perſonall tithes for buying and ſelling ſhall neuer be payed for the value of the thing, but for the cleere gaines of the thing: And therefore I take the caſes before rehearſed, where a man ſelleth his land, or pulleth downe a houſe, and ſelleth the ſtuffe, that he ſhould there pay no tith, that it is there to be vnderſtood, that he hath not land or houſe by gift or by diſcent: For if a man buy land, or buy timber and ſtuffe of a houſe, and ſell it for a gayne, I ſuppoſe that he ſhould pay a perſonall tythe for that gaine. And this caſe is not like to a fee or annuitie granted for counſell, where the whole fee ſhal be tithed for the, charges deducted, or ſome certaine ſumme for it by agreement, for there the whole fee commeth for his counſell, which is by his owne induſtrie. But in the other caſe it is not ſo, and the ſame reaſon as for the perſonal tithe might be made of trees, when they diſcend or be giuen to any man, and he ſelleth them to another, that he ſhall pay no perſonall tythe. Do. Me thinketh that if the horſe amend in his keeping, & then he ſell the horſe, that then the tithe ſhalbe paied

of

of that that the horſe hath increaſed in value after the gift, and ſo it may be of trées, that he ſhall pay tythe of that that the trées may be amended after the gift or diſcent. Stu. Then the tythe muſt be the x. part of the increaſe the expences deducted, and then of trées the charges muſt alſo bee deducted, for it is then a Perſonall tithe, and there is no trée that is ſo much worth as it hath hurt the ground by ỹ growing: therefore there can no Perſonall tythe be paid by the owner of the ground when he ſelleth them, though they haue increaſed in his time. Neuertheleſſe I will ſpeake no farther of that matter at this time, but will ſhew thee, that if Tin, Lead, Cole, or trées be ſold, that a mixt tithe cannot grow thereby; For a mixt tithe is properly of Calues, Lambs, Pigs, and ſuch other that come part of the ground that they bee fed of, and part of the keeping, induſtrie, and ouerſight of the owners, as it is ſaid before: But Tin, Lead, and Cole are part of the ground and of the freehold, & trees grow of themſelues, and be alſo annexed to the freehold, and will grow of themſelues: and alſo the mixt tithe muſt bee paid yearely at certaine times appointed by the Law or by cuſtome of the countrie, but it may happen that Tinne, lead, cole, & trees, ſhall not bee felled or taken in many yeres, & ſo it ſeemeth it cãnot be any mixt tithe, & theſe be ſome of the reaſons, which they ỹ would maintaine ỹ ſtatut & preſcription to be good, make to proue their intent as they think. D. what think they, if a man ſel the lops of his wood, whether any tith ought there to be paid?

S. They

S. They thinke all one law of the trees and of the lops. D. And if he vse to fell the lops once in xij. or xvj. yere, what hold they then? St. That is all one. D. And what is the reason why Tythe ought not be payed there aswell as for wood vnder xx. yeare? St. For they say, that the lops are to be taken of the same condition as the Trees be what time soeuer they be felled, and that no custome will serue in that case against the statute, no more than it should do of great trées. D. And what hold they of the barke of the trées? Stu. Therein I haue not heard of their opinion, but it seemeth to be one Law of the lops. Doct. I perceiue well by that thou hast sayd before, that thy mind is, that if a whole Countrie prescribe to be quite of Tythes of trees, corne, and grasse, or of any other tythes, that that prescription is good, so that the spirituall ministers haue sufficient beside to liue vpon, doest thou meane so? S. Yes verily. D. And then I would know thy mind, if any man contrary to that prescription were sued in the Spirituall Court for Corne and grasse, or any other Tythes, whether a Prohibition should lye in that case, as it did after thy mind before the sayd Statute, where a man was sued in the Spirituall Court for Tythe Wood.

S. I thinke nay. D. And why not there, aswell as it did where a man was sued for the tythe wood? S. For as I take it, there is great diuersitie betweene the cases, and that for this cause; There is a Maxime in the law of England, that if any suit be taken in the Spiritual

Court

court, whereby any goods or lands might bee recouered, which after the grounds of the law of the Realme ought not to bee sued there, though perçase the Kings Court shall hold no plee thereof, that yet a Prohibition should lye, and after when it had continued long that no tythes were paied of wood, because of the said prohibition, and that after by proceſſe of time some Curats began to aske Tithes of wood, contrarie to the Law and contrarie to the said prescription, so that variance began to rise betweèn Curats and their Parishoners in that behalfe, then for appeasing the said variance the said statute was made, and that as it seemeth more at the calling on of the spiritualtie than of the Temporalty; For the Statut doth not expreſſely graunt that the Prohibition in that case of tythe wood should lye so largely as some say it lay by the Law: Howbeit, it doth not restraine the common Law therein, as it appeareth euidently by the words of the Statute, and so after some men it appeareth before the Statut, and also after the Statute (as I haue touched before) that the spirituall Court ought not in that case to haue made any proceſſe for tithe wood: and therefore if they did, a Prohibition lay by the cõmon Law. And like law is if the spiritual court make proces vpon such a Legacie as by the law of the realme is void. As if a man bequeth to one another măs horſe, & the spirituall court thereupon maketh Proceſſe to execute that legacy, there a Prohibition lyeth: For it appeareth euidently in the libell, if all the trueth appeare in the libel, that

in

in the law of the realme the legacie is void to all intents: And that hee to whom the legacie is made, shall neither haue the horse nor the value of the horse. And in likewise if a man sell his land for C.l. and he is sued after in the spirituall court for tithe of the said C.l. There a Prohibitiō shall lie, for it appeareth in that case openly in ꝑ libell that no tith ought to bee paid, and that the spirituall Law ought not in that case to make any processe whereby the goods of him that sold the land might be taken from him against the law of the Realme. And vpon this ground it is, that if a man were sued in the Spirituall Court, now sith the statute for a Mortuarie, that a Prohibition should lye, for it appeareth in the libell, that sith the statut there ought no suit to be taken for Mortuaries: and the same law is, if any suit were taken in the Spirituall court for a new dutie that is of late taken in some places vpon leases of Parsonages and vicarages, which is called Dimission noble, for it appeareth euidently in the libell if any be made thereupon, that no such Processe ought by the law of the Realme to bee made in that behalfe. But in the case of tythe corne or grasse, or such other things, wherein thou hast desired to know my mind, there appeareth nothing in the libell but that the suite thereof, of right appertaineth to the spirituall Law, and so for any thing that appeareth, the partie may bee holpen in the Spirituall Court by the prescription: And if the case were so farre put that in the Spirituall Court they would not allow the said prescription, yet I thinke no

pro-

prohibition should lye: For though the spirituall Iudges in a spirituall matter denie ꝑties of iustice, yet the Kings lawes cannot reforme that, but must remit to their conscience: But if there were some remedie prouided in that case, it were well done: For some men say, that in the spirituall Court they will admit no plee against tithes. And also if a cõposition were made by assent of the Patron and also of the Ordinarie betweene a Parson & one of his parishioners, that the Parson & his successors should haue for a certaine grouñ so many quarters of corne for his tithe perely, & after contrarie to the composition the Parson in the spirituall Court asketh the tithes as they fall, that in this case no Prohibition should lye, ne yet though the case were further put, that the cõposition were pleaded in the Court & were disallowed, but all resteth in the conscience of the Iudge spirituall (as is said before.) Howbeit, because some bee of opinion that a Prohibition should lye in this last case, therefore I will refer it to the iudgement of other: But in the case of prescription, before rehearsed, I take it for the clerrer case, that no Prohibitiõ should lie as I haue said before. And I beseech our Lord that this matter & such other like thereto, may be so charitably looked vpon, that there bee not hereafter such diuisions ne such diuersities of opiniõs therin, as hath bin in time past, whereby hath followed great costs and charges to many persons in this Realme: And that hath moued me to speake so farre in this Chapter, and in diuers other Chapters in this present

booke as I haue done: Not intending thereby to giue occasion to any person to withhold his tithes that of right ought to bee paid, ne to alter the portion therein beforе accustomed, but that (as me thinketh) they ought to be claimed by the said title as they ought to bee payed, and by none other. And that it may also somewhat appeare that the said statute of 45. Ed. 3. was well and lawfully made, and vpon a good reasonable consideratiō, and that the said prescription is good also, so that no man was in any danger of excommunication for the making of the said statute, nor yet is not for the obseruing thereof, ne yet of the said prescription, as it is noted by some persons that there should bee. And thus I commit thee vnto our Lord, who euer haue both thee and me in his blessed képing euerlastingly. Amen.

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